

Final Programmatic Agreement

Among

The U.S. Department of State,
 U.S. Army Corps of Engineers,
 U.S. Department of Agriculture, Forest Service
 U.S. Department of Agriculture, Natural Resources Conservation Service,
 North Dakota State Historic Preservation Officer,
 Minnesota State Historic Preservation Officer,
 Wisconsin State Historic Preservation Officer,
 Fond du Lac Band of Lake Superior Chippewa,
 Leech Lake Band of Ojibwe, and
 Enbridge Energy Company, Inc.

Regarding the Enbridge Energy, Limited Partnership Alberta Clipper Project

WHEREAS, the U.S. Department of State (DOS) receives and considers applications for permits for cross border oil pipelines pursuant to the authority delegated by the President of the United States under Executive Order (EO) 13337 (69 Federal Register 25299); and

WHEREAS, on May 14, 2007, the DOS received an application for a Presidential Permit from Enbridge Energy Limited Partnership (Enbridge) for the Enbridge Alberta Clipper Pipeline Project (Project) to cross the border from Canada into the United States; and

WHEREAS, the Project consists of construction of approximately 326 miles of crude oil pipeline in North Dakota, Minnesota, and Wisconsin, with associated aboveground facilities (such as pump stations, transmission facilities, and substations), and ancillary facilities (such as lateral pipeline, temporary workplace areas, and pipe storage and contractor yards); and

WHEREAS, DOS has determined that issuance of a Presidential Permit for the Project triggers review under Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470f, as amended) and its implementing regulations, "Protection of Historic Properties," (36 C.F.R. Part 800); and

WHEREAS, the DOS has determined that a Programmatic Agreement (PA) for the Project is necessary. The effects on potential historic properties cannot be fully assessed prior to the issuance of the Presidential Permit for the Project, because access to some Project areas has been denied by landowners, minor expansions of the Area of Potential Effect (APE) are anticipated but have yet to be determined, and the identification of some Traditional Cultural Properties (TCPs) by tribes that are consulting parties will not be completed prior to the issuance of the Presidential Permit; and

WHEREAS, this PA sets forth procedures for consultation related to the identification and evaluation of historic properties in portions of the APE that have not yet been surveyed and for the determination of eligibility, assessment of effects, resolution of adverse effects, and post-review discoveries throughout the entire APE, as necessary, that has not been accomplished to date; and

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Alberta Clipper Project
June 09, 2009FINAL Programmatic Agreement
SECTION 1UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ADOLPH HEISNER
DATE/CASE ID: 03 JUN 2010 2009024351
UNCLASSIFIED

1
2 **WHEREAS**, in accordance with 36 C.F.R. §§ 800.4(b)(2) and 800.5(a)(3), this PA establishes
3 the process by which the DOS will complete the identification, evaluation, and assessment of
4 Project effects on historic properties; and

5
6 **WHEREAS**, the St. Paul District, U.S. Army Corps of Engineers (USACE) is evaluating a
7 permit application for the Project to place structures in, under, or over navigable waters of the
8 U.S. pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403) and for the
9 placement of dredged or fill material in waters of the U.S. pursuant to Section 404 of the Clean
10 Water Act (33 U.S.C. §1344; see 33 C.F.R. Part 323). The issuance of a permit under either
11 statute would be a federal action associated with the undertaking that requires compliance with
12 Section 106 of the NHPA and 36 C.F.R. Part 800; and

13
14 **WHEREAS**, the Natural Resources Conservation Service (NRCS) has determined that it retains
15 rights to a 2.3 acre portion of two Wetlands Reserve Program (WRP) (16 U.S.C. § 3837 et seq)
16 easements in the State of North Dakota and that the installation and maintenance of the Project
17 pipeline on these WRP easements is a federal action associated with the undertaking that requires
18 compliance with Section 106 of NHPA and 36 C.F.R. Part 800; and

19
20 **WHEREAS**, the United States Forest Service (USFS) has determined that the Project, which
21 crosses the Chippewa National Forest (CNF) will require consistency with the CNF Land And
22 Resource Management Plan and is a federal action associated with the undertaking that requires
23 compliance with Section 106 of NHPA and 36 C.F.R. Part 800; and

24
25 **WHEREAS**, DOS, USACE, USFS, and NRCS have agreed that the DOS will be the lead
26 federal agency for purposes of Section 106 of the NHPA in accordance with 36 C.F.R. §
27 800.2(a)(2); and

28
29 **WHEREAS**, on June 18, 2008, the DOS determined, in consultation with parties to this PA, that
30 the Project APE extends from Neche, North Dakota, through the state of Minnesota, to Superior,
31 Wisconsin, and includes a 140 foot wide corridor, collocated along the existing Enbridge
32 pipeline facilities/easements, extending from the centerline of the outermost existing Enbridge
33 pipeline, except for a proposed spread that departs from the existing ROW to the west and south
34 of the Fond du Lac Reservation and then re-joins the existing Right of Way (ROW). Also
35 included in the APE are project related access roads, transmission facilities and corridors,
36 environmental crossings, temporary work spaces or construction areas, pipeline reroutes, and
37 appurtenant facilities that may fall outside of the 140 foot corridor and may not be contiguous;
38 and

39
40 **WHEREAS**, the Project bisects the Leech Lake Indian Reservation of the Leech Lake Band of
41 Ojibwe (LLBO) a federally recognized Indian Tribe that exercises its inherent governmental
42 authority within the exterior boundaries of the Reservation; and

43
44 **WHEREAS**, the Leech Lake Indian Reservation overlaps with the CNF; and

45
46 **WHEREAS**, the LLBO Tribal Historic Preservation Officer (THPO) has assumed Section 106

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1 review responsibilities for archaeological sites under Section 101(d)(2) of the NHPA for the
2 Project APE that occurs within the exterior boundaries of the Leech Lake Indian Reservation
3 consistent with 36 C.F.R. § 800.2(c)(2)(i)(A); and
4

5 **WHEREAS**, the Project bisects the Fond du Lac Chippewa Reservation that contains property
6 held in trust by the United States Government for the Fond du Lac Band of Lake Superior
7 Chippewa (FDL), a federally recognized Indian Tribe that exercises its inherent governmental
8 authority within the exterior boundaries of the Reservation; and
9

10 **WHEREAS**, the FDL have appointed a designated representative (FDL Contact) to consult with
11 the DOS regarding the Project and the potential for impacts to historic properties within the
12 exterior boundaries of the Fond du Lac Chippewa Reservation consistent with 36 C.F.R. §
13 800.2(c)(2)(i)(B); and
14

15 **WHEREAS**, the DOS has initiated consultation with the LLBO THPO, FDL, and the State
16 Historic Preservation Officers (SHPO) of North Dakota, Minnesota, and Wisconsin concerning
17 the determination of the APE and the identification, evaluation, and treatment of historic
18 properties; and
19

20 **WHEREAS**, the DOS has reviewed cultural resource reports that cover nearly all of the Project
21 APE and received concurrences regarding eligibility and non-eligibility of cultural resources
22 from the FDL (pending), LLBO THPO, North Dakota SHPO, Minnesota SHPO (pending), and
23 Wisconsin SHPO; and
24

25 **WHEREAS**, to date, the DOS has determined, with the concurrence of the LLBO THPO, North
26 Dakota SHPO, Minnesota SHPO (pending), and Wisconsin SHPO that the Project will not
27 adversely effect any of the historic properties identified in the cultural resource reports
28 referenced in Attachment G and as noted in the tables in Attachment H; and
29

30 **WHEREAS**, the United States Government has a unique trust relationship with Indian tribes, as
31 set forth in the Constitution of the United States and by numerous treaties and provisions of law
32 including, but not limited to, the NHPA, the American Indian Religious Freedom Act
33 ("AIRFA"), the Native American Graves Protection and Repatriation Act ("NAGPRA"), the
34 Archaeological Resources Protection Act ("ARPA") and the Treaty of LaPointe (10 Stat. 1109)
35 and many others; and
36

37 **WHEREAS**, the federal and state agencies, and the consulting parties on this project recognize
38 that the TCPs potentially affected by this project, some of which may be determined to be
39 historic properties for the purposes of Section 106, are vital to the preservation of endangered
40 tribal resources, Indian cultural heritage, and traditional lifeways for present and future
41 generations; and
42

43 **WHEREAS**, to promote and support government-to-government relationships with federally
44 recognized sovereign nations, the DOS is undertaking, through consultation as required in 36
45 C.F.R. Part 800 and other federal authorities, to work in partnership with the consulting tribes

1 and other signatories to address and find solutions for the issues of concern on the Project
2 whenever practicable and appropriate; and

3
4 **WHEREAS**, Enbridge wishes to cooperate with the DOS and other federal agencies, who fully
5 intend to fulfill their responsibilities to establish and maintain relationships with federally
6 recognized Indian tribes for the purpose of building stable, long-term working relationships
7 which result in positive, mutually understood and beneficial solutions to common situations; and

8
9 **WHEREAS**, Enbridge, which will construct the Project pipeline, has participated in consultation
10 and has been invited by DOS under 36 C.F.R. §§ 800.2(c)(4) and 800.6(c)(2) to sign this PA as
11 an invited signatory; and

12
13 **WHEREAS**, DOS invited the Indian tribes listed in Attachment B to participate in consultation;
14 and

15
16 **WHEREAS**, the Bois Forte Band of the Minnesota Chippewa, the Flandreau Santee Sioux
17 Tribe, Ho-Chunk Nation, the Fond du Lac Band of Lake Superior Chippewa, the Forest County
18 Potawatomi, the Fort Peck Tribe, the Leech Lake Band of Ojibwe, the Lower Sioux Community,
19 the Mille Lacs Band of Ojibwe, the Red Cliff Band of Lake Superior Chippewa Indians of
20 Wisconsin, the Red Lake Band of Chippewa Indians, the Sisseton Wahpeton Oyate Sioux, the
21 Spirit Lake Tribe, the Standing Rock Sioux, the Upper Sioux Community, and the White Earth
22 Band of Ojibwe have participated in the consultation for the development of this PA and DOS
23 has invited them to concur in this PA, in accord with 36 C.F.R. §§ 800.2(c)(2) and 800.6(c)(3);
24 and

25
26 **WHEREAS**, on April 8, 2008, the DOS notified all consulting parties it intended to use the
27 NEPA public process to meet the public process requirements of Section 106 of the National
28 Historic Preservation Act (NHPA) as permitted under 36 C.F.R. 800.2(d); and

29
30 **WHEREAS**, in accordance with 36 C.F.R. § 800.6(a)(1), the DOS has notified the Advisory
31 Council on Historic Preservation (ACHP) that there is the potential for an adverse effect, and the
32 ACHP has chosen to participate in the consultation pursuant to 36 C.F.R. § 800.6(a)(1)(iii);

33
34 **NOW, THEREFORE** DOS, USACE, USFS, NRCS, ACHP, LLBO THPO, FDL, and North
35 Dakota, Minnesota, Wisconsin SHPOs, and Enbridge agree the following stipulations will be
36 implemented in order to take into account the effect of the project on historic properties and to
37 satisfy all responsibilities under Section 106 of the NHPA.

38
39
40 **STIPULATIONS**

41
42 The DOS, in consultation with the USACE, USFS, and NRCS, will ensure that the following
43 measures are carried out.

44
45
46 **I. FEDERAL AGENCY RESPONSIBILITIES**

1 A. DOS will incorporate this PA into its decisional process on any Presidential permit it
 2 may issue for the Enbridge Alberta Clipper project and will include in any permit it
 3 issues on the Enbridge Alberta Clipper project a condition that Enbridge [abide by its
 4 commitments under] this PA.

5
 6 B. USACE, USFS, and NRCS shall attach this PA as a condition of agency approval for
 7 any Federal action (i.e. permit, license, etc.), associated with this undertaking.

8
 9 C. Identification and evaluation studies and treatment measures required under the terms
 10 of this PA will be carried out by or under the direct supervision of a professional(s)
 11 who meets, at a minimum, the *Secretary of the Interior's Historic Preservation*
 12 *Professional Qualification Standards* (48 FR 44716, September 29, 1983; 36 C.F.R.
 13 Part 61 (Appendix A)). Additional professional qualification standards for
 14 archaeologists are contained in Attachment I.

15
 16 D. For identification and evaluation studies, and treatment measures required under the
 17 terms of this PA developed by Enbridge, DOS shall ensure these studies and
 18 treatment measures take into account the following:

- 19
 20 1. the ACHP's *Section 106 Archaeology Guidance* (2007);
 21 2. the ACHP's *Policy Statement Regarding the Treatment of Burial Sites, Human*
 22 *Remains and Funerary Objects* (February 23, 2007);
 23 3. applicable SHPO guidance and standards;
 24 4. the Secretary of the Interior's *Standards and Guidelines for Archaeology and*
 25 *Historic Preservation* (48 FR 44716-42, September 29, 1983) with additional
 26 guidance from 36 C.F.R. Part 800 (as amended through August 5, 2004)
 27 concerning tribal properties of religious and cultural significance and the
 28 National Register Bulletins No. 38 and No. 41. noted below;
 29 5. the "*Treatment of Archaeological Properties*" (ACHP 1983);
 30 6. the *Guidelines for Reporting on Cultural Resources Investigations for Pipeline*
 31 *Projects*" (Federal Energy Regulatory Commission, Office of Energy Projects,
 32 December 2002);
 33 7. ACHP, NPS, NATHPO "Tribal Consultation: Best Practices in Historic
 34 Preservation" (May 2005);
 35 8. National Register Bulletin No. 41, "Guidelines for Evaluating and Registering
 36 Cemeteries and Burial Places";
 37 9. National Register Bulletin No. 38, "Guidelines for Evaluating and Documenting
 38 Traditional Cultural Properties";
 39 10. Wisconsin State Statute 157.70 (Wisconsin Burial Sites Act);
 40 11. North Dakota Century Code §23-06-27 and administrative rules North Dakota
 41 Administrative Code Chapter 40-02-03;
 42 12. Section 307-08 of the Minnesota Private Cemeteries Act;
 43 13. *State Archaeologist's Procedures for Implementing Minnesota's Private*
 44 *Cemeteries Act; and*
 45 14. Applicable state guidelines concerning the identification, evaluation, and
 46 treatment of historic properties.

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II. CONFIDENTIALITY

DOS, USFS, NRCS, and USACE will safeguard information about historic properties of religious and cultural significance to Indian tribes, including location information, or information provided by Indian tribes to assist in the identification of such properties, as requested by Indian tribes, to the extent allowed by Section 304 of NHPA [16 U.S.C. 470w3] and other applicable laws.

III. DEFINITIONS

Coordination Plan: A plan (more fully explained in Stipulation V.B.) that describes the coordination of construction with identification and evaluation of cultural resources, treatment of adverse effects, and protection of unanticipated discoveries.

Concurring Parties: An invited consulting party to this PA that agrees with the content of the PA. The refusal of a concurring party to sign the PA does not invalidate this PA as noted in 36 C.F.R. § 800.6(c)(3). Concurring parties may not terminate the PA.

Construction spread: A construction unit or segment of a pipeline alignment or corridor to be determined by Enbridge prior to construction.

Consulting Parties: Parties that have consultative roles in the Section 106 process, as defined in 36 C.F.R. § 800.2(c).

Cultural Resource: Locations of human activity, occupation, or usage that contain materials, structures, or landscapes that were used, built, or modified by people.

Data Recovery: The recovery of archaeological information from a historic property subject to an adverse effect.

Determination of Effect: A determination made by a federal agency in regards to a Project's effect upon a historic property as defined in 36 C.F.R. Part 800.

Determination of Eligibility: A determination made by a federal agency in regards to a cultural resource's eligibility for inclusion in the National Register of Historic Places (NRHP) and more fully described in 36 C.F.R. Part 60 and 36 C.F.R. § 800.16(l)(2).

Effect: An alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the NRHP (see 36 C.F.R. § 800.16(i)).

Environmental Impact Statement: An analysis of a major federal action's environmental impacts conducted under the auspices of NEPA.

Historic Property: Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the NRHP maintained by the Secretary of the Interior. This term

1 includes artifacts, records, and remains that are related to and located within such properties.
 2 The term includes properties of traditional religious and cultural importance to an Indian Tribe or
 3 Native Hawaiian organization and that meet the National Register criteria (see 36 C.F.R. §
 4 800.16(I)(a)).

5
 6 Invited Signatory: The DOS has invited Enbridge to be a signatory to this PA pursuant to 36
 7 C.F.R. § 800.6(c)(2). The refusal of any invited signatory to sign the PA does not invalidate the
 8 PA.

9
 10 Monitoring Plan: A plan (more fully described in Stipulation V.D.) that identifies appropriate
 11 areas for monitoring construction by professionals under the supervision of individuals that meet
 12 the professional qualifications in Stipulation I.C. The plan's principal goal is to reduce the
 13 potential for impacts to unidentified historic properties.

14
 15 Signatory Parties: All signatories to this PA, which includes the DOS, NRCS, USACE, USFS,
 16 LLBO THPO, FDL Contact, and the SHPOs of North Dakota, Minnesota, and Wisconsin and
 17 Enbridge. (Signatory parties include the federal agency(ies), SHPOs, THPOs (or designee) if the
 18 undertaking is carried out on Tribal land or affects historic properties on Tribal land, and also
 19 any invited signatories [not including invited concurring parties]).

20
 21 Traditional Cultural Property: A district, site, building, structure, or object that may be eligible
 22 for inclusion in the NRHP that derives its significance from its association with cultural practices
 23 or beliefs of a living community that (a) are rooted in that community's history, and (b) are
 24 important in maintaining the continuing cultural identity of the community. TCPs are more fully
 25 defined in NRHP Bulletin #38.

26
 27 Treatment Plan: A plan developed in consultation with the parties to this PA that identifies the
 28 minimization, and mitigation measures for historic properties located within the APE that will be
 29 adversely affected by the Project.

30
 31 **IV. CONSULTING PARTY REVIEW OF DETERMINATIONS, COORDINATION**
 32 **PLANS, MONITORING PLANS AND TREATMENT PLANS.**

33 **A. General**

- 34
 35 1. Pursuant to the procedures set forth in Stipulation IV, DOS will afford signatory parties
 36 and consulting parties an opportunity to consult on the identification and evaluation of
 37 historic properties and on the development of treatment plans to resolve adverse effects
 38 to historic properties. This consultation will include identification and evaluation of
 39 historic properties of religious and cultural significance to Indian parties, assessment of
 40 Project effects, coordination plans, monitoring plans, and the treatment plans prepared
 41 for adversely affected historic properties that have not been completed and reviewed
 42 prior to the release of the Final EIS. Review periods will vary and are stipulated below.
 43

44 **B. Shortened Review Period and Concurrence**

- 1 1. If no comments from signatory parties and concurring parties are received by DOS
2 following a determination of eligibility or effect, and a given review period has ended,
3 the DOS may assume concurrence.
4
- 5 2. All review periods noted for DOS determinations in this PA may be shortened when all
6 signatory parties to this PA agree in writing (letter or email) that an abbreviated review
7 period is warranted and appropriate notification is provided. Concurring parties to the
8 PA may only comment on the shortened review period. The DOS will take into account
9 and respond to comments submitted by concurring parties. If objections are submitted by
10 a signatory party, then the DOS will work to resolve the objection. If the DOS cannot
11 resolve the objection within five days of receiving the objection, then the original review
12 period listed in the applicable PA stipulation shall be maintained.
13

14 C. Tribal Consultation with Enbridge

- 15 1. The DOS as lead agency will remain responsible for conducting government-to-
16 government consultation with Indian tribes, unless the tribe agrees, in writing, to consult
17 directly with Enbridge. Tribes shall notify the DOS through a letter or other written
18 agreement, that it is the intention of the tribe to consult and coordinate directly with
19 Enbridge concerning the identification and evaluation of potential historic properties as
20 reported in fieldwork reports, coordination plans, monitoring plans, treatment plans, as
21 well as evaluation of potential historic properties and resolution of adverse effects to
22 historic properties. If disagreements arise from consultation between the tribes and
23 Enbridge, the Tribes and/or Enbridge will forward the nature of the disagreements to the
24 DOS. The DOS shall attempt to resolve the disagreements. If unable to resolve the
25 disagreement, the tribes and DOS shall resolve them through the process outlined in
26 Stipulation X. [The DOS shall remain responsible for carrying out all stipulations of this
27 PA.
28
29

30 V. ALBERTA CLIPPER PROJECT – PIPELINE CONSTRUCTION

31 A. Identification and Evaluation of Historic Properties

- 32 1. For those areas not previously surveyed due to a lack of access, as listed in
33 Attachment A of this PA, and for areas added to the APE due to Project
34 modifications, the DOS, in consultation with the signatory parties and consulting
35 parties, will complete the identification and evaluation of historic properties within
36 the APE, assess effects, and resolve any adverse effects to those historic properties
37 prior to the initiation by Enbridge of construction in the vicinity of an un-surveyed
38 property in accordance with 36 C.F.R. §§ 800.4 through 800.6.
39
40
- 41 a. The DOS will notify the signatory parties and consulting parties that a scoping
42 period for cultural resource investigations has been initiated. The DOS will take
43 into account all scoping comments from the signatory parties and consulting
44 parties. Consultation after this scoping period will follow the requirements of
45 Stipulation V.A.1.
46

- 1 b. During scoping for cultural resource investigations, the DOS will rely on
 2 information on historic properties of religious and cultural significance (which may
 3 include TCPs) submitted by Indian tribes to DOS within thirty (30) days of scoping
 4 notification (with appropriate documentation).
 5
 6 2. After this PA is executed and in addition to the consultation required in Stipulation
 7 V.A.1., DOS will develop a summary of the results of all identification and
 8 evaluation fieldwork and determinations of eligibility and effect completed for
 9 unsurveyed segments of the APE quarterly to update the Section 106 documentation
 10 for this Project. A summary of eligibility and effect determinations for the Project to
 11 date is included in Appendix H of this PA.
 12
 13 a. The first summary of results will be submitted to DOS by Enbridge. DOS shall
 14 distribute the summary to the signatory parties and consulting parties within ninety
 15 (90) days of the execution of this PA and every ninety (90) days thereafter or on a
 16 more frequent basis if requested by Enbridge;
 17
 18 b. After the preparation of cultural resources reports and following the completion of
 19 Stipulation V.A.1., Enbridge will distribute to the LLBO THPO, the FDL Contact,
 20 and applicable SHPO descriptive information about identified cultural resources in
 21 GIS format as well as the final cultural resource reports.
 22

23 **B. Coordination Plan**

- 24 1. In the event Enbridge cannot complete the identification and evaluation of historic
 25 properties prior to the initiation of construction activities in a construction spread,
 26 Enbridge will develop and submit a Coordination Plan, consistent with Stipulation
 27 V.A. to DOS for review and approval. Coordination Plans will not be used on
 28 federal lands within the CNF.
 29
 30 a. This plan shall describe measures that will be implemented to ensure that adverse
 31 effects that may result from vegetation clearing and construction activities are
 32 avoided pending the completion of identification and evaluation of cultural
 33 resources. This Coordination Plan, for instance, may utilize construction exclusion
 34 zones, so that construction activities, or construction-related activities will not
 35 occur in, or immediately adjacent to areas where investigations to identify and
 36 evaluate cultural resources, and/or treat historic properties have yet to be
 37 completed.
 38
 39 b. In addition, the plan will include a schedule for all proposed activities and
 40 recommended measures for the protection of unanticipated discoveries in
 41 accordance with Attachments C, D, and E, as appropriate.
 42
 43 c. The DOS shall make the coordination plan available to consulting parties and
 44 signatory parties for a thirty (30) day review period once it has received the plan
 45 from Enbridge. DOS shall take into account comments received prior to approving

1 the plan for implementation. The DOS-approved Plan will be incorporated into all
 2 construction documents and implemented accordingly.

3
 4 **C. Monitoring Plan**

- 5 1. Prior to the commencement of construction, Enbridge shall prepare and submit a
 6 Project-wide Monitoring Plan for DOS to review and approve. After DOS receives
 7 and reviews the plan, the DOS shall make the Monitoring Plan available to
 8 consulting parties and signatory parties for a thirty (30) day review period. DOS
 9 shall take into account comments received prior to approving the plan for
 10 implementation. The DOS-approved plan will be prepared prior to construction and
 11 incorporated into all construction documents and implemented accordingly.
- 12 a. This plan shall describe measures to be implemented in areas that are appropriate
 13 for monitoring, as determined by DOS in consultation with the signatory parties
 14 and the consulting parties. Consultation will occur during the thirty (30) day
 15 review period described in V.C.1.
- 16 b. Any historic properties identified by Enbridge will be treated in accordance with
 17 Stipulation V.A. and for human remains Attachments C, D, and E shall apply.
- 18 c. Construction monitoring will be performed by a professional who meets the
 19 qualification standards for archaeology established in Stipulation I.C. Other types
 20 of experience with construction monitoring and/or traditional cultural knowledge
 21 may be substituted for degrees required by the Standards at the discretion of the
 22 DOS.
- 23
 24
 25 d. The Monitoring Plan shall outline the criteria used to select areas for monitoring,
 26 identifies opportunities for Indian tribes to participate as monitors during Project
 27 construction in areas appropriate for monitoring, outlines the protocols for monitor
 28 participation in the Project, and that includes the appropriate Unanticipated
 29 Discoveries Plan that is consistent with Stipulation VI. The Monitoring Plan shall
 30 include sufficient mapping such that areas to be monitored are clearly delineated.
- 31
 32 e. Enbridge will implement the Final Monitoring Plan for the Project, as approved by
 33 DOS.
 34

35 **D. Treatment Plan**

- 36 1. Avoidance of adverse effects to historic properties shall be the preferred treatment.
 37 All avoidance and minimization measures shall be presented in the cultural resource
 38 reports on identification and evaluation results consistent with Stipulation V.A.1. In
 39 consultation with the signatory parties and consulting parties, the DOS will finalize
 40 the proposed avoidance measures and Enbridge shall implement the final avoidance
 41 and minimization measures.

- 1 1. Environmental Inspector (EI): Prior to initiating vegetative clearing or construction
2 in any spread, Enbridge shall obtain a written notice to proceed with construction
3 from the DOS. Enbridge shall submit to DOS a certification from the EI of
4 compliance with any Coordination Plan, Monitoring Plan, and any Treatment Plan
5 that has been developed for that spread or a statement that implementation of any of
6 these plans is not applicable to that particular spread. In meeting this responsibility,
7 the EI will rely on the technical expertise of professionals who meet the standards
8 established in Stipulation I.C. to prepare the Coordination Plan, Monitoring Plan,
9 and/or Treatment Plan, report on cultural resource monitoring along the corridor, and
10 report on the disposition of unanticipated discoveries made during construction to the
11 DOS and consulting parties and signatory parties. The DOS shall require that
12 Enbridge retain a professional who meets the standards established in Stipulation I.C.
13 on an on-call basis for the duration of Project construction.
14
15 a. The EI will monitor construction activities on-site and prepare a daily log reporting
16 to Enbridge on activities performed to implement the terms of this PA, as
17 appropriate.
18
19 b. Enbridge will ensure through the construction documents that the EI will possess
20 the authority to stop construction in the event of an inadvertent discovery in
21 accordance with Stipulation VLA and Attachments C, D, and E.
22
23 2. Training: In consultation with DOS, Enbridge will ensure the EI receives appropriate
24 training in historic preservation and identification of historic properties, from a
25 professional who meets the standards established in Stipulation I.C. in order to
26 perform the requirements of this PA. Enbridge also will provide an appropriate level
27 of training in historic preservation and identification of historic properties conducted
28 by a professional who meets the standards established in Stipulation I.C. to all
29 construction personnel (including new, added, replaced workers) so that PA
30 requirements are understood and unanticipated discoveries quickly identified.
31 Enbridge will offer this training prior to initiating vegetative clearing or construction
32 activities on a spread, and conduct periodic refresher training during construction of
33 the spread. Training shall also include the identification of and avoidance methods
34 for sensitive tribal biological species.
35
36 3. Construction Contract: Enbridge will incorporate the terms of Stipulation V.D and
37 Attachments C, D, and E into construction documents to ensure that its EI and
38 construction contractors meet their responsibility for notification of the unanticipated
39 discoveries.
40

41 F. Scheduling

42
43 The DOS may authorize the start of vegetative clearing and construction for a spread when
44 the plans prepared in accordance with Stipulations V.B., V.C., and V.D, as appropriate, have
45 been submitted by Enbridge and approved by DOS in accordance with the terms of this PA.
46

1
2 **VI. UNANTICIPATED DISCOVERIES DURING CONSTRUCTION**

3 **A. Unanticipated Discoveries (not including human burials, remains, or funerary goods)**

- 4
5 1. For the purposes of Stipulations VI.A and VLB, the "applicable federal agency" is the
6 federal agency with ownership or management jurisdiction over (real property interest
7 in) the land on which construction is occurring or, in the absence of such an agency
8 with real property interest, the DOS. For this stipulation, the USFS has jurisdiction
9 over lands within the CNF and the NRCS retains jurisdiction over two bisected
10 parcels that are subject to WRP easements.
- 11
12 2. If previously unidentified historic properties (including but not limited to ruins,
13 prehistoric/historic artifacts, other archaeological remains, TCPs, and sacred sites),
14 are discovered unexpectedly as pipeline construction activities are carried out within
15 the APE, the construction contractor will immediately halt all construction activity
16 within a one-hundred (100) foot radius (or greater as appropriate) of the discovery,
17 notify Enbridge's EI of the discovery and implement interim measures to protect the
18 discovery from looting and vandalism. Within forty-eight (48) hours of the discovery,
19 the EI shall:
- 20
21 a. inspect the work site to determine the extent of the discovery and ensure that
22 construction activities have halted;
- 23
24 b. clearly mark the area of the discovery;
- 25
26 c. implement additional measures, as appropriate, to protect the discovery from
27 looting and vandalism; this includes securing the site, immediately taking photo
28 documentation of the discovery, and making a brief written report of the
29 discovery;
- 30
31 d. notify the signatory parties and consulting parties of the discovery and distribute
32 the written report and photo documentation to these parties; and
- 33
34 e. following notification, construction may resume outside of the one-hundred (100)
35 foot (or greater as necessary) radius of the discovery.
- 36
37 3. The applicable federal agency will have at least seven (7) calendar days following
38 notification provided in accordance with Stipulation VI.A.2, to determine the
39 National Register eligibility of the discovery and actions that the agency proposes to
40 resolve adverse effects (if any). The applicable federal agency shall submit written
41 notice of its determination of eligibility, assessment of effects, resolution of adverse
42 effects (if any) and any associated cultural resource reports to the signatory parties
43 and the consulting parties for comment. Comments concerning eligibility of the
44 discovery and Project effects are due within thirty (30) days from receipt of the
45 applicable federal agency's notice. The applicable federal agency may assume the
46 newly discovered property to be eligible for the National Register for the purposes of

1 Section 106 pursuant to 36 C.F.R. § 800.13(c) until the appropriate cultural resources
2 study is completed.

3
4 4. For properties determined eligible pursuant to Stipulation VI.A.3, the applicable
5 federal agency shall ensure that:

6
7 a. timely filed recommendations of consulting parties and signatory parties are taken
8 into account prior to granting approval of the measures that Enbridge will
9 implement to resolve adverse effects.

10
11 b. Enbridge carries out the approved measures prior to resuming construction
12 activities in the location of the discovery. Enbridge shall provide documentation
13 to the applicable federal agency of execution of approved measures. Following
14 review and acceptance of the documentation, the applicable federal agency shall
15 issue a written notice to proceed to Enbridge and shall provide copies of the
16 written notice to all signatory parties and consulting parties.

17
18 c. within six (6) months of the resumption of construction within the location of the
19 discovery, Enbridge submits a final report to the applicable federal agency for
20 distribution to signatory parties and consulting parties describing implementation
21 of the actions taken in accordance with Stipulation VI.A and, as appropriate, the
22 analysis and interpretation of recovered information. The applicable federal
23 agency shall consult with consulting parties and signatory parties prior to
24 approval of the report. Signatory parties and consulting parties shall have thirty
25 (30) days to review the applicable federal agency's findings and the report and
26 submit comments to the applicable federal agency.

27
28 5. Dispute Resolution for Unanticipated Discoveries: The applicable federal agency
29 will seek and take into account the recommendations of the ACHP in resolving any
30 disagreements that may arise regarding resolution of adverse effects. The applicable
31 federal agency will use the contact information provided in Attachments C, D, or E in
32 order to notify the ACHP. Within fifteen (15) days of receipt of such a written request
33 and a report that outlines the nature of the disagreement and the findings of the
34 applicable federal agency, the ACHP will provide the applicable federal agency with
35 recommendations on resolving the dispute. The applicable federal agency will take
36 into account any timely filed recommendations provided by the ACHP in making a
37 final decision about how to proceed.

38
39 B. Unanticipated Discovery of Human Burials and Remains, and Funerary Objects

40
41 1. When Native American human remains, funerary objects or objects of cultural
42 patrimony are unexpectedly discovered during construction of the Project on federal
43 or tribal lands within the APE, Enbridge shall notify immediately the federal agency
44 with jurisdiction, or, with respect to tribal lands, to the responsible Tribal official
45 consistent with the Native American Graves Protection and Repatriation Act

1 (NAGPRA) [25 U.S.C. 3001 et. seq.] and its implementing regulations, 43 C.F.R.
 2 Part 10, as well as other agency Treatment Plans and policies, as appropriate.

3
 4 2. The applicable federal agency shall be responsible, in consultation with the Indian
 5 tribes and with the professional assistance of an archaeologist that meets the
 6 Standards outlined in I.C., for making the determination regarding the Native
 7 American or non-Native American status of the human remains. For human remains
 8 discovered on the Chippewa National Forest, Attachment D of this PA shall apply.
 9 For human remains identified within the exterior boundaries of the Leech Lake
 10 Reservation and the Fond du Lac Chippewa Reservation, Attachment E of this PA
 11 shall apply.

12
 13 3. Non-Native American human burials and remains, and funerary objects discovered on
 14 federal lands within the APE will be treated by the applicable federal agency in
 15 accordance with applicable federal law, taking into account the ACHP's *Policy*
 16 *Statement on the Treatment of Burial Sites, Human Remains and Funerary Objects*
 17 (February 23, 2007) as well as other agency Treatment Plans and policies, as
 18 appropriate.

19
 20 4. Enbridge will treat human burials and remains discovered on non-federal land in
 21 accordance with the provisions of Attachment C, and any applicable state laws, such
 22 as Section 307-08 of the Minnesota Private Cemeteries Act, Wisconsin State Statute
 23 157.70 (Wisconsin Burial Sites Act), or North Dakota Century Code §23-06-27 and
 24 administrative rules North Dakota Administrative Code Chapter 40-02-03. In
 25 determining appropriate actions to be carried out DOS will be guided by the ACHP's
 26 *Policy Statement on the Treatment of Burial Sites, Human Remains and Funerary*
 27 *Objects* (February 23, 2007).

28
 29
 30 **VII. CURATION**

31 A. Federal agencies will curate any artifacts, materials or records that are not subject to
 32 NAGPRA or other federal law but are resulting from archaeological identification and
 33 mitigation conducted on federal lands under their jurisdiction in accordance with 36
 34 C.F.R. Part 79, "*Curation of Federally-Owned and Administered Archaeological*
 35 *Collections*".

36
 37 B. Enbridge will return all artifacts recovered from private lands to the respective landowner
 38 after analysis is complete, unless applicable state law requires otherwise. Enbridge will
 39 encourage and assist landowners in donating any returned artifacts to a local curation
 40 facility identified by the respective SHPO and/or THPO, FDL Contact, or applicable
 41 tribal representative if on tribal lands.

42
 43 C. Federal agencies will determine the disposition of human burials, human remains and
 44 funerary objects in accordance with applicable federal law.
 45
 46

1 **VIII. REPORTING**

2 A. Within a year of completing pipeline construction in a spread, Enbridge will submit a
3 comprehensive draft report to DOS describing the results and findings of the
4 implementation of the actions and plans specified in Stipulations V.A through D,
5 including Attachments C, D and E. The DOS shall review the draft report and distribute
6 the report to the signatory parties and consulting parties for thirty (30) day review and
7 comment. Enbridge shall address timely comments and recommendations in preparation
8 of the Final Comprehensive Report for that spread. Following the comment period,
9 Enbridge will revise and submit the final report to DOS for review and approval.
10
11

12 **IX. MONITORING IMPLEMENTATION OF THE PA**

13 Each quarter following the execution of this PA until it expires or is terminated, the DOS will
14 provide the consulting parties and signatory parties to this PA a progress report summarizing the
15 work carried out pursuant to its terms. Such report will include any scheduling changes
16 proposed, any problems encountered, and any disputes and objections received in the efforts to
17 carry out the terms of this PA. DOS will maintain and update a list of the current contacts for the
18 consulting parties and signatory parties to be distributed at each quarterly report.
19
20

21 **X. DISPUTE RESOLUTION**

22 A. "Appropriate federal agency" refers to the DOS, USACE, NRCS, or USFS, as applicable.
23

24 B. Should any signatory or concurring party to this PA object at any time to any actions
25 proposed or the manner in which the terms of this PA are implemented, the appropriate
26 federal agency and DOS will consult with such party to resolve the objection. If the
27 appropriate federal agency determines that such objection cannot be resolved, the
28 appropriate federal agency will:

- 29
- 30 1. Notify the signatory parties and consulting parties that an objection cannot be
31 resolved.
 - 32
 - 33 2. Forward all documentation relevant to the dispute, including the applicable federal
34 agency's proposed resolution, to the ACHP, signatory parties, and consulting parties
35 for comment. The ACHP, signatory parties, and consulting parties will provide the
36 appropriate federal agency with its advice on the resolution of the objection within
37 thirty (30) days of receiving adequate documentation. Prior to reaching a final
38 decision on the dispute, the appropriate federal agency will prepare a written response
39 that takes into account any timely advice or comments regarding the dispute from the
40 ACHP, signatory parties and consulting parties and provide them with a copy of this
41 written response. The appropriate federal agency will then proceed according to its
42 final decision.
43

- 1 3. If the ACHP does not provide its advice regarding the dispute within the thirty (30)
- 2 day time period, the applicable federal agency may make a final decision on the
- 3 dispute and proceed accordingly. Prior to reaching such a final decision, the
- 4 appropriate federal agency will prepare a written response that takes into account any
- 5 timely comments regarding the dispute from the signatory parties and consulting
- 6 parties, and provide them and the ACHP with a copy of such written response.
- 7
- 8 C. The appropriate federal agency's responsibilities to carry out all other actions subject to
- 9 the terms of this PA that are not the subject of the dispute remain unchanged.
- 10
- 11 D. Notwithstanding any other provisions of the PA, all signatory parties retain any and all
- 12 rights to seek redress of disputes regarding this PA or its implementation in a court of
- 13 applicable jurisdiction, except that such parties must first use the process under
- 14 Stipulation X.A to X.C. to attempt to resolve those disputes that fall within the scope of
- 15 that Stipulation.
- 16
- 17
- 18

19 **XI. DURATION**

20 This PA will be in force for a period of four (4) years from the date it is executed or until all of

21 its stipulations that require action by the signatories have been carried out, whichever occurs

22 first. If work on this Project is not completed within four (4) years, DOS may consult with the

23 other signatory parties to either amend the PA to extend its duration or modify the terms of the

24 PA, as appropriate in accordance with Stipulation XII. The DOS will notify the signatory parties

25 and consulting parties as to the course of action it intends to pursue at least ninety (90) days

26 before the PA would expire.

27

28

29 **XII. AMENDMENT**

30 Any signatory party to this PA may propose in writing to the other signatory parties that it be

31 amended. The signatory parties will consult in an effort to reach agreement on an amendment.

32 Any amendment will be effective on the date it is signed by all of the signatories and filed with

33 the ACHP.

34

35

36 **XIII. TERMINATION**

- 37 A. If any signatory party to this PA determines that its terms will not or cannot be carried
- 38 out, that party will immediately consult with the other signatory parties to attempt to
- 39 develop an amendment to this PA per Stipulation XII. If within thirty (30) days an
- 40 amendment cannot be reached, any signatory may terminate the PA upon written
- 41 notification to the other signatories.
- 42
- 43 B. Once the PA is terminated, and prior to work continuing on the Project, the DOS shall
- 44 request, take into account, and respond to the comments of the ACHP in accordance with

1 36 C.F.R. § 800.7(a). Following consultation with the ACHP, the DOS will notify the
2 signatory parties and consulting parties as to the course of action it intends to pursue.
3
4

5 **XIV. ANTI-DEFICIENCY PROVISION**

6 Any obligation of the DOS, USACE, USFS, or NRCS set forth in this PA is subject to and
7 dependent on appropriations by Congress and allocation of sufficient funds for that purpose.
8

9 **XV. SCOPE OF THE PA**

10 A. This PA is limited in scope to actions related to the proposed construction of the Alberta
11 Clipper Project and related facilities and the associated consideration of historic
12 properties, pursuant to 36 C.F.R. Part 800 and other federal laws, and is entered into
13 solely for these purposes.

14 B. This PA in no way restricts any of the signatory parties from participating in similar
15 activities with other public or private agencies, organizations, and individuals.
16
17

18 C. This PA is neither a fiscal nor a funds obligation document. Any endeavor involving
19 reimbursement or contribution of funds between the parties to this instrument will be
20 handled in accordance with applicable laws, regulations and procedures including those
21 for Federal Government procurement and printing. Such endeavors will be outlined in
22 separate agreements that shall be made in writing by representatives of the parties and
23 shall be independently authorized by appropriate statutory authority. This instrument
24 does not provide such authority.
25

26 **XVI. RESPONSIBILITIES OF PARTIES**

27
28 All parties to this PA and their respective agencies and office will handle their own activities and
29 utilize their own resources, including the expenditure of their own funds, in pursuing these
30 objectives unless otherwise independently agreed upon.
31
32
33

34 **EXECUTION** of this PA by the DOS, USACE, USFS, NRCS, the North Dakota SHPO,
35 Minnesota SHPO, and Wisconsin SHPO, LLBO THPO, FDL, and implementation of its terms
36 evidence that the DOS, USACE, USFS, and NRCS have taken into account the effects of the
37 Project on historic properties and afforded the ACHP an opportunity to comment.



Deputy Secretary of State
United States Department of State

Date

UNCLASSIFIED

L6

Schnitker, John P

RELEASED IN FULL

From: Duggan, J. Brian
Sent: Tuesday, August 04, 2009 9:40 AM
To: Park, Pamela P
Cc: Schnitker, John P; EEB-A-STAFF-ASSISTANTS-DL
Subject: FW: FINAL: EEB/AM/D(S) Alberta Clipper Pipeline and the National Historic Preservation Act
SES No. 200914329 UNCLASSIFIED

Attachments: 200914329



08045915.tif
(1,012 KB)

Pamela: D signed the programmatic agreement, but did not date it. Do I have permission to print it, add yesterday's date on the signature line, and re-scan for transmittal to the pipeline company, which needs the PA to secure other permits. They still will not get their State permit until the 15 day window has run. brian

-----Original Message-----

From: Michaels, Richard C
Sent: Tuesday, August 04, 2009 9:22 AM
To: Hengel, Douglas C; McManus, Matthew T
Cc: EEB-A-WHA-DL; EEB-A-STAFF-ASSISTANTS-DL
Subject: FW: FINAL: EEB/AM/D(S) Alberta Clipper Pipeline and the National Historic Preservation Act SES No. 200914329 UNCLASSIFIED

-----Original Message-----

From: McPhail, Donald L
Sent: Tuesday, August 04, 2009 1:00 AM
To: SES Memoranda
Cc: TTL-D-L; TTL-D-S; TTL-F; TTL-EEB; TTL-L; TTL-INR; TTL-OES; TTL-PA; TTL-SP; TTL-WHA
Subject: FINAL: EEB/AM/D(S) Alberta Clipper Pipeline and the National Historic Preservation Act SES No. 200914329 UNCLASSIFIED