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of the
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Cultural Resources Protection Program
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Dear Ms. St. Hilaire:

Thank you for the opportunity to comment on the latest (January 31, 2008) *Systemwide Programmatic Agreement for the Management of Historic Properties affected by the Multipurpose Operations of Fourteen Projects of the Federal Columbia River Power System for Compliance with Section 106 of the National Historic Preservation Act (PA)*. The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Cultural Resources Protection Program (CRPP) appreciates that the Bonneville Power Administration, U.S. Army Corps of Engineers, and Bureau of Reclamation (Agencies) took the time to meet with us on March 18 to discuss our concerns about this draft; the CTUIR found the meeting particularly productive. We feel that PA has dramatically improved since the previous draft.

At the March 18 meeting, the CTUIR focused on trying to gain an understanding of how the FCRPS will operate differently under the PA than it currently does. It is our understanding that until the project specific programmatic agreements or historic property management plans are adopted, there will be no real change, with two exceptions. The scope of the PA includes what had previously been separate undertakings, which had followed 36CFR800. We remain curious to see how these projects will be addressed, and whether the changes will be different at different reservoirs. The PA's Attachment 5 is a good effort toward explaining the undertaking, but it is still unclear how consulting parties will understand which compliance system is being followed and who the lead federal agency or agencies will be for a given aspect of the undertaking. We also discussed the exempted activities listed in Attachment 6. The CTUIR has specific problems with a number of the activities in this list; rather than detail our numerous concerns, our recommendation is to develop exempted activities lists in the individual programmatic agreements and not have a list at all in this overall PA.

Another subject discussed at the meeting is how consultation will work if a tribe is not part of a Cooperating Group. The CRPP suggested that the Agencies identify the specific tasks each Cooperating Group is expected to complete and commit to involving each affected tribe in those tasks, whether through a Cooperating Group or some other mechanism. This subject is of critical importance; the CTUIR must be assured that consultation regarding this ongoing undertaking is not limited by the functionality of individual Cooperating Groups.

We appreciate the efforts that Agencies have made to clarify issues surrounding historic properties of religious and cultural significance to Indian Tribes (HPRCSIT). As discussed, we support using this cumbersome term rather than "traditional cultural property" because, as stated in the Advisory Council on

Historic Preservation's draft *Consultation with Indian Tribes in the Section 106 Review Process: Guidelines* (May 2007; emphasis in original),

Within the Section 106 process, the appropriate terminology for sites of concern to tribes is **“historic property of religious and cultural significance to an Indian tribe.”** Unlike the term TCP, this phrase appears in NHPA and the Section 106 regulations. **It applies strictly to tribal sites, unlike the term TCP.** Furthermore, Section 101(d)(6)(A) of NHPA reminds agencies that historic properties of religious and cultural significance to Indian tribes may be eligible for the National Register. Thus, it is not necessary to use the term TCP when considering whether a site with significance to a tribe is eligible for the National Register as part of the Section 106 process. The NPS Bulletin 38 guidelines are helpful, however, in providing an overview of how National Register criteria are applied.

There is another complication involved with the term TCP: Bulletin 38 has sometimes been interpreted as requiring that an Indian tribe demonstrate continual use of a site in order for it to be considered as a TCP. The NHPA and the Section 106 regulations reflect the understanding that tribes have frequently been geographically separated from historic properties of religious and cultural significance to them by no fault of their own, and thus do not carry any requirement to demonstrate continual use.

The CTUIR supports a provision within the PA to assess HPRCSITs thematically, or in groups, rather than evaluating each site individually. We look forward to further discussion regarding the role of the State Historic Preservation Offices (or in some cases Tribal Historic Preservation Offices) in eligibility determinations regarding HPRCSITs when the specific tribe and the Agencies are in agreement. As we noted in the meeting, we are unclear about what expertise a SHPO (or a THPO from another tribe) would add to the discussion of eligibility for HPRCSITs when the tribe and Agencies are in agreement.

At the meeting, we had considerable discussion about the rights of Tribes who do not sign the PA. This began as a discussion of the use of the terms “signatory parties” and “consulting parties.” It is the CTUIR’s position that affected tribes, signatory or not, must be consulted with regarding any amendment to the PA. Since the PA is basically a re-write of the regulations implementing the National Historic Preservation Act, changes to the alternative regulations are undoubtedly an undertaking with the potential to affect historic properties to which tribes attach religious and cultural significance. The PA’s termination clause recognizes a role for all of the consulting parties. We recommend ensuring that consulting parties are afforded appropriate rights under this agreement.

As we have discussed throughout the development of this PA, it is difficult to understand it in the context of 36CFR800 because rather than achieving the goals of the alternative procedures laid out in 36CFR800.14, this document outlines a plan for developing alternative procedures on the project level in the future. This becomes particularly problematic with the statement on page 3, “Now, therefore, pursuant to 36CFR800.14(b), the Lead Federal Agencies shall take into account the effects of the undertaking on historic properties in accordance with the following stipulations, and adherence to the terms of this PA shall satisfy the Lead Federal Agencies’ Section 106 responsibilities for addressing the effects of the undertaking on historic properties.” We understand that this terminology is present in most PAs developed under 36CFR800.14, but from the CTUIR’s point of view, the Agencies cannot claim to have satisfied their Section 106 responsibilities until all of the individual project specific PAs have been completed; until that time the Agencies must follow the process laid out in 36CFR800. Execution of this PA is merely evidence of a step toward satisfying the Agencies’ responsibilities.

The CTUIR expressed disappointment at the meeting that the Agencies had not addressed most of the language we recommended adding to the PA in our previous comments. As we stated then, the CTUIR

hoped the PA would “reflect a spirit of cooperation between the Agencies and Tribes. Such a cooperatively prepared document would be more similar to the Missouri River programmatic agreement in terms of tone and content.” We suggested the addition of a number of Whereases taken from Agency policies (see Attachment 1; we still recommend adding them). As an example we mentioned the Agencies’ response to the whereas regarding trust responsibility.

The suggested language from the CTUIR (comment 136) was to add:

Whereas the Federal Government has a trust responsibility to Indian Tribes, which includes the duty to act ‘with good faith and utter loyalty to the best interests of the Indians’. The Lead Federal Agencies will act in accordance with the Federal trust responsibility, including government-to-government consultation whenever the Lead Federal Agencies’ ‘plans or actions affect trust resources, trust assets, or Tribal health and safety’. The Lead Federal Agencies will treat sacred and culturally significant places as subject to the Federal trust responsibility and therefore Tribes must be engaged in consultation before decisions are made, and Tribes expect to participate in making decisions and in carrying out decisions regarding these resources.

This language was taken from different portions of the Missouri River programmatic agreement. The Agencies’ response to this comment was that this Whereas would not be included because:

The Systemwide PA addresses NHPA Section 106 responsibilities, and therefore does not affect Federal trust responsibilities to tribes. Whereas #12 affirms the government-to-government relationship between tribes and the Federal government, and the Lead Federal Agencies intend to enter into government-to-government consultation when appropriate. Whereas #10 references Agency tribal policies, and acknowledges that the undertaking affects historic properties with traditional religious and cultural importance to tribes.

In our meeting, the Agencies suggested they do not have a trust responsibility to protect cultural resources because they are not trust assets. The following are the lead agencies’ policies on trust resources and trust responsibility.

Bureau of Reclamation, <http://www.usbr.gov/native/naao/policies/policy.html>

Trust Resources: The United States government has an Indian trust responsibility to protect and maintain rights reserved by or granted to Indian Tribes or Indian individuals by treaties, statutes, and executive orders. Reclamation, as a federal executive agency, shares this responsibility.

Corps of Engineers, <http://www.usace.army.mil/cw/cecw-p/pgls/pgl57a.pdf>

TRUST RESPONSIBILITY - The U.S. Army Corps of Engineers will work to meet trust obligations, protect trust resources, and obtain Tribal views of trust and treaty responsibilities or actions related to the Corps, in accordance with provisions of treaties, laws and Executive Orders as well as principles lodged in the Constitution of the United States.

Bonneville Power Administration, <http://www.bpa.gov/Corporate/KT/Trblpolicy.pdf>

I. BPA recognizes that a trust responsibility derives from the historical relationship between the Federal government and the Tribes as expressed in Treaties, statutes, Executive Orders, and Federal Indian case law. Using these legal underpinnings, BPA and the Tribes will work cooperatively to arrive at an understanding of how the trust responsibility applies to a government-to-government relationship.

The Bureau of Reclamation policy recognizes that the trust responsibility extends to protect rights of tribes granted by statute. The Corps of Engineers policy does not define trust resources, but acknowledges an obligation to obtain tribal views on trust responsibilities in accordance with the laws of the United States. The Bonneville Power Administration policy acknowledges that some of the trust responsibility’s foundation is in statutes. These three policies are consistent on the point that statutory

rights granted to tribes are relevant to the trust responsibility. Trust resources can be secured by treaty or by statute; the trust responsibility remains the same.

The Agencies' response to comment 136 and statements in our meeting entirely miss the point that the United States owes tribes the trust responsibility to care for rights and resources in their control which are subject to tribal rights under treaty or statute. Perhaps the underlying disagreement is a confusion regarding the foundations of the United States trust responsibility to tribes. In only the narrowest sense does this area of law overlap with the Law of Trusts. The trust resources at issue (cultural resources) may or may not be trust assets, but this does not affect the statutory obligations of the federal agencies with regards to the tribes. For instance, the Bureau of Reclamation has defined trust assets as follows:

Indian Trust Assets (ITAs) are legal interests in property held in trust by the United States for Indian Tribes or individuals. The Secretary of the Interior, acting as the trustee, holds many assets in trust. Examples of objects that may be trust assets are lands, minerals, hunting and fishing rights, and water rights. While most ITAs are on reservations, they may also be found off-reservations. The United States has an Indian trust responsibility to protect and maintain rights reserved by or granted to Indian Tribes or Indian individuals by treaties, statutes, and executive orders. These are sometimes further interpreted through court decisions and regulations.^{1[1]}

This acknowledges that trust responsibility includes those rights protected by statute, in addition to those reserved by treaty. There is no debate that tribes have rights to be consulted under the National Historic Preservation Act, the Archaeological Resources Protection Act, and the Native American Graves Protection and Repatriation Act. These tribal rights are explicitly enumerated in those statutes and regulations; the United States has an obligation to manage cultural resources in consultation with Indian tribes. The acknowledgement that the United States has a trust responsibility to manage these resources does not expand or contract any existing legal obligation the agencies already have.

The action agencies should, at the very least, rewrite the 10th Whereas to state:

Whereas the Federal Government has a trust responsibility to Indian Tribes, the Lead Federal Agencies will act in accordance with that responsibility, including government-to-government consultation whenever the Lead Federal Agencies' plans or actions affect trust resources or trust assets. The Lead Federal Agencies will treat historic properties of religious and cultural significance to Indian Tribes as subject to the Federal trust responsibility and therefore Tribes must be engaged in consultation before decisions are made, and Tribes expect to participate in making decisions and in carrying out decisions regarding these resources.

In terms of specific changes, the CRPP recommends the following.

- Add the Bureau of Reclamation's policy to Whereas 10 (<http://www.usbr.gov/native/naao/policies/policy.html>)
- Remove Stipulation III(C).
- Please clarify what is meant by the text I have italicized in Stipulation III(D): "The APE may be discontinuous or interrupted, excluding geographic areas where the undertaking does not cause effects due to *attenuation, intervening effects, or other factors.*"
- We do not agree with the Bureau of Reclamation's insistence on the sentence in Stipulation IV(C) "Access terms for evaluation or treatment shall be sufficient to ensure that any materials collected will be permanently curated under conditions that allow for appropriate care, use, and access." We do not deny that such terms are appropriate in some cases; they may not be appropriate in all cases. Decisions about individual situations should be made on a case by case basis by the consulting parties; this overarching PA should not place an absolute prohibition on all excavation without provisions for permanent curation.

^{1[1]} http://www.usbr.gov/mp/cao/field_offices/new_melones/RMP/RIR/5.0-Indian_Trust_Assets.pdf

- Add the word “cultural” in Stipulation VII(B) so that it reads, “The Systemwide Research Design would be developed to encourage consideration at the Project level of research, cultural, and educational objectives that have application on a broader, potentially regional level.”
- Add “context statements” to Stipulation VII(B)(1).
- The first sentence of Stipulation X is confusing.
- Stipulation XII describes the dispute resolution process. For signatory parties, the ACHP may determine not to consider the dispute “in which case the Agencies may proceed with the proposed action.” Under this PA, we are not clear what the proposed action is or under what circumstances the Agencies would not proceed with it.
- Attachment 4, Treatment Plan Principles. Add “that are being adversely affected by the undertaking” to the first bullet.
- Attachment 4, Treatment Plan Principles. Remove “The SHPO would be involved if a TCP was on lands outside of reservation boundaries” from the fifth bullet.
- Attachment 4, Treatment Plan Principles, sixth bullet. Remove the fourth sentence, as it is understood that the mitigation option is tied to the National Register criteria and it is up to the consulting parties to consider the feasibility and cost on a case by case basis. Also remove “consistent with Agency authorities” from the fifth sentence as nothing can be done under this PA that is not consistent with Agency authorities.

Thank you again for soliciting our comments regarding this document. If the Agencies have any questions about our comments, please feel free to contact me, Shawn Steinmetz, or Catherine Dickson at (541) 276-3629 or tearafarrow@ctuir.com, shawnsteinmetz@ctuir.com, or catherinedickson@ctuir.com.

Respectfully,



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Program Manager

cc: Johnson Meninick, Yakama Nation
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Attachment 1: Recommended Language to Add to the PA

Whereas the impacts of system operations could eventually destroy a large percentage of the cultural resources within the APE; the cumulative effect would be the loss of heritage sites and traditional cultural resources from a river system in an entire region.

Whereas the Lead Federal Agencies have committed to implement, in full cooperation with affected Tribes and agencies, agreements, plans, and actions for management of the impacts to cultural resources. Individual Tribes' desired approach and preferred methods for cultural resources management will be a major consideration in the development, as well as the implementation, of each of the long-term management plans.

Whereas it is the policy of the Lead Federal Agencies to preserve, protect, and manage significant archaeological, historical, and traditional cultural properties within the APE in accordance with the NHPA and other applicable statutes, executive orders, and regulations.

Whereas it is the policy of the Lead Federal Agencies to uphold the terms of treaties between the United States and Indian Tribes, and executive orders regarding Indian Tribes.

Whereas the Lead Federal Agencies are required by Section 101(d)(6) of the NHPA to consult with any Indian Tribe that attaches religious and cultural significance to historic properties that may be affected by undertakings as defined in the NHPA.

Whereas the Federal Government has a trust responsibility to Indian Tribes, which includes the duty to act 'with good faith and utter loyalty to the best interests of the Indians'. The Lead Federal Agencies will act in accordance with the Federal trust responsibility, including government-to-government consultation whenever the Lead Federal Agencies' 'plans or actions affect trust resources, trust assets, or Tribal health and safety'. The Lead Federal Agencies will treat sacred and culturally significant places as subject to the Federal trust responsibility and therefore Tribes must be engaged in consultation before decisions are made, and Tribes expect to participate in making decisions and in carrying out decisions regarding these resources.

Whereas this PA is designed to facilitate the development of processes and strategies to minimize, avoid, or mitigate the ongoing adverse impacts the operation of the FCRPS caused.

Whereas this PA seeks to create a shared stewardship document that will ensure that sacred and cultural places are regarded and understood from various, including Tribal, viewpoints, and that Tribal values and customs (not just archaeological values and customs) are applied to the protection of these places. Until now, archaeological values have been dominant over Tribal values, and archaeological values have contributed to the destruction of sacred places.

Whereas this PA's fundamental value is respect: respect for the rivers; the sacred and cultural places; Tribal values, culture, and beliefs; Tribal people and their contribution to the history and environment of the Columbia River system; for the sacrifices Tribal people have made so that newcomers can have flood control, irrigated crops, navigation, electricity, and recreational activities. When Tribal representatives talk about Tribes' cultures, needs, and issues, they will be taken as seriously as archaeologists are when they talk about Tribes' ancestors, culture, and interests.