SECOND AMENDED
PROGRAMMATIC AGREEMENT

Implementing Section 106 of the National Historic Preservation Act for the Federal-aid Highway Program in Washington State Administered by the Federal Highway Administration

INTRODUCTION

WHEREAS, the Federal Highway Administration Washington Division (FHWA), administers the Federal-aid highway program authorized by 23 U.S.C. § 101 et seq., through the Washington State Department of Transportation (WSDOT) (23 U.S.C. § 315); and

WHEREAS, FHWA is responsible for assuring compliance with Section 106 in relation to the Federal-aid highway program and has determined that the Federal-aid Highway program may have an effect on properties included in or eligible for inclusion in the National Register of Historic Places, and the parties to this Agreement have consulted in accordance with Section 800.14(b) of the regulations (36 CFR Part 800) implementing Section 106 of the National Historic Preservation Act (NHPA–16 USC § 470f) and this Agreement is adopted pursuant to those regulations, and

WHEREAS, in the development of this Agreement, FHWA and WSDOT have consulted with Indian tribes (listed in Exhibit A) that ascribe traditional cultural and religious significance to historic properties that may be affected by Federal-aid Highway projects in the State of Washington; and

WHEREAS, the parties to this Agreement have executed an earlier agreement as of July 18, 2000, entitled *Programmatic Agreement Among the Federal Highway Administration, the Washington State Department of Transportation, the Advisory Council on Historic Preservation, and the Washington State Historic Preservation Officer Regarding Implementation of the Federal-Aid Highway Program in Washington State*, and an amended agreement dated March 7, 2007 entitled *First Amended Programmatic Agreement,* both of which this Agreement replaces and supersedes.

NOW, THEREFORE, this Agreement is entered into among the FHWA, acting through its Division Administrator for Washington State, the federal Advisory Council on Historic Preservation (ACHP), acting through its Executive Director, the WSDOT, acting through the Secretary of Transportation, and the Washington State Department of Archaeology and Historic Preservation (DAHP), acting through its Director, who for purposes of the NHPA is lawfully designated to act as the State Historic Preservation Officer (SHPO). The parties agree that the review of Federal-aid Highway projects in Washington State shall be administered according to the following stipulations:

STIPULATIONS

FHWA shall ensure that the following measures are carried out:

I. APPLICABILITY

A. The terms of this Agreement, including Stipulation V, do not apply to undertakings on, or that may affect, Tribal trust land or Tribal lands as defined in 16 U.S.C. 470*w*.

B. This Agreement does not apply to undertakings on federal lands or to other federal agencies.

C. This Agreement requires that WSDOT employs professional staff meeting the Professional Qualifications Standards established by the Secretary of the Interior.[1] WSDOT staff who possess these professional qualifications are referred to in this Agreement as Cultural Resources Specialists. Involvement of Cultural Resources Specialists is required throughout the Section 106 compliance process, and specifically for the application of the procedure contained in Stipulation V, determination of Areas of Potential Effects, and the selection of consultants and the review of their scopes of work and work products.

D. Guidance documents issued by the ACHP shall be used in the interpretation of this Agreement, and in overall implementation of Section 106, as and to the extent they are applicable and helpful. For any matter regarding Section 106 compliance not addressed in this Agreement, the provisions of Section 106 of the NHPA and its implementing regulations (36 CFR Part 800) shall apply.

II. DEFINITIONS

In this Agreement the following words shall have the following meanings, taken from 36 CFR 800.16:

Undertaking means a project, activity or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation. (Note: Consulting Parties formally recognized in 36 CFR 800 include SHPO; Indian tribes; representatives of local governments; applicants for federal

[1] *See* 36 CFR Part 61. It is the intention of this Agreement that it shall be interpreted to incorporate any subsequent standards promulgated by the Secretary of the Interior as then in force at any applicable time during the course of this Agreement's use.

assistance, permits, licenses and other approvals; and additional individuals and organizations with a demonstrated interest in the undertaking due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.)

Area of Potential Effects means the geographic area or areas within which an undertaking may directly or indirectly cause alterations to the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of the undertaking and may be different for different kinds of effects caused by the undertaking.

Historic Property means any prehistoric or historic district, site, building, structure or object included in or eligible for inclusion in the National Register of Historic Places. This term includes artifacts, records and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe and that meet the National Register criteria. *Eligible for inclusion in the National Register* includes both properties formally determined as such and all other properties that meet the National Register criteria.

Indian Tribe means an Indian tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791

National Register criteria means the criteria established by the Secretary of Interior for use in evaluating the eligibility of properties for the National Register (36 CFR Part 60).

Memorandum of Agreement means the document that records the terms and conditions agreed upon in the Section 106 review process to resolve the adverse effects of an undertaking upon historic properties.

III. PROGRAMMATIC RESPONSIBILITIES OF FHWA AND WSDOT

A. FHWA Responsibilities

1. In compliance with its responsibilities under Section 106 of the National Historic Preservation Act, and as a condition of its award to WSDOT of any assistance under the Federal-aid highway program, FHWA will ensure that WSDOT as its delegate carries out the responsibilities it is assigned in the stipulations of this Agreement.

2. FHWA, or WSDOT on behalf of FHWA, shall ensure that it consults and coordinates with other federal agencies and/or tribes that have a regulatory or land management interest in undertakings going through the Section 106 review process.

3. This Agreement also applies to undertakings that jointly apply FHWA and Federal Transit Administration funding when FTA agrees that FHWA is the Lead Agency for the purposes of Section 106.

4. FHWA retains the ultimate decision-making authority and responsibilities for Section 106 compliance. FHWA shall make an annual assessment of Section 106 compliance actions carried out by WSDOT under this Agreement and submit the assessment to the SHPO and the ACHP. FHWA will take appropriate action and reassess the application of this Agreement if WSDOT is found to be in non-compliance with this Agreement.

B. WSDOT Responsibilities

1. WSDOT shall define each undertaking in sufficient detail so that the Section 106 review can be conducted. The development of an undertaking by WSDOT will include early involvement of a Cultural Resources Specialist to assist in the identification of issues so that the definition of the undertaking can effectively support the further steps in the Section 106 review process. The involvement of the Cultural Resources Specialist should begin at the earliest scoping or design stages.

2. Certain activities with minimal potential to cause effects to historic properties, as described in Stipulation V and Exhibit B, will not require review by FHWA, SHPO, or the ACHP. WSDOT shall maintain an electronic list-serv, updated regularly, listing all undertakings that were determined to have minimal potential to cause effects to historic properties in accordance with this Agreement. Should any party have questions or concerns involving such undertakings and desire to engage in consultation, the listing will contain contact information and further consultation may occur.

3. The steps of the Section 106 review process should be coordinated with the overall planning process for the undertaking and with reviews under the National Environmental Policy Act (NEPA), Section 4(f) of the Department of Transportation Act, and other laws. Generally, WSDOT may use information developed for other reviews to help to meet the requirements of Section 106.

4. WSDOT shall compile a report of Section 106 compliance actions necessary for the annual assessment required in Stipulation III.A.4.

5. WSDOT shall identify any other parties entitled to be consulting parties and invite them to participate, including local governments and Indian tribes. Additional parties may be invited as the Section 106 review process moves forward. A reasonable and good faith effort shall be made to identify and invite to be consulting parties any Indian tribes that might attach religious and cultural significance to historic properties in the Area of Potential Effects.[2]

[2] *See* 36 CFR Part 36 sec. 800.3(f)(2). Such Indian tribe that requests in writing to be a consulting party shall be one.

6. In consultation with SHPO, WSDOT shall also plan for involving the public generally in the Section 106 review process as distinct from the role played in the Section 106 review process by consulting parties. This public involvement may occur in coordination with similar activities under NEPA.

7. WSDOT, on behalf of and in conjunction with FHWA, shall initiate consultation for federally funded transportation projects for which a local government is the applicant. WSDOT will make its cultural resources training available, and otherwise provide technical assistance, to local agencies involved in federal-aid project development.

IV. SPECIAL CONSIDERATIONS RELATING TO CONSULTATION WITH INDIAN TRIBES

A. FHWA recognizes that it has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions; and that consultation with an Indian tribe must, therefore, recognize the government to government relationship between the federal government and Indian tribes. Nothing in this Agreement affects or changes FHWA's trust responsibilities and obligations toward Indian tribes. Consultation with Indian tribes must also recognize and respect the government-to-government relationships that exist among federal and state governments and federally-recognized Indian tribes. The Section 106 review process is one of the consultations within the framework of those government-to-government relationships established by the NHPA and other laws, agreements and policies, including the Centennial Accord[3]. Accordingly, the parties recognize that consultation with Indian tribes is also carried out that is not related to the Section 106 process.

B. WSDOT and FHWA shall ensure that Indian tribes are provided information regarding proposed undertakings early in project planning and are invited to participate in consultation in accordance with the requirements of Section 101(d)(6) of the NHPA and 36 CFR Part 800. This Agreement recognizes the guidance titled "Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act" published by the ACHP on July 1, 2011. Nothing in this Agreement abrogates FHWA's responsibility for government-to-government consultation with Indian tribes at their request. Upon receipt of a written request from any Indian tribe or officially designated representative of an Indian tribe, to consult with FHWA in lieu of or in addition to WSDOT, FHWA shall consult with that Indian tribe for the particular undertaking or program.

C. WSDOT will document any consultation with Indian tribes WSDOT conducts on behalf of FHWA and provide FHWA the opportunity to participate directly in such consultation on individual undertakings as the circumstances warrant. WSDOT shall keep FHWA

[3] *Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington.* The accord, dated August 4, 1989, between the Governor of Washington State and the 29 federally-recognized Indian tribes, is to better achieve mutual goals through an improved relationship between their sovereign governments, and provides the framework for a government-to-government relationship.

informed of the status of such consultation, provide advance notice of meetings so that FHWA will have the opportunity to be represented in attendance if desired, and supply documents including meeting notes and correspondence to FHWA, to meet the needs of effective consultation. WSDOT and FHWA shall abide by the confidentiality provisions of Section 304 of the NHPA in determining what information may be provided to non-federal parties (16 USC § 470w-3).

D. Before stipulations of this Agreement regarding tribal consultation may be implemented, and annually thereafter, FHWA shall send a letter to each Indian tribe in Washington State, as well as to Indian tribes outside the State but with interests in historic properties in the State, notifying the tribes of the execution of this Agreement, transmitting a copy of the Agreement, noting that WSDOT may initiate consultation with Indian tribes for undertakings carried out under provisions of this Agreement, and giving Indian tribes the option of consulting directly with FHWA for individual undertakings or types of undertakings.

V. UNDERTAKINGS PRESUMED TO HAVE MINIMAL POTENTIAL TO CAUSE EFFECTS

A. Certain projects and activities are presumed to have minimal potential to cause effects to historic properties and can be exempted from further Section 106 review by a WSDOT Cultural Resources Specialist. Examples of such activities may include: those that do not involve ground disturbance; those that do not modify historic structures (over 50 years old); those that affect bridges programmatically determined not NRHP eligible; those that occur in fill deposits and road prisms; and in-kind repairs or replacements to structures, among others. Those undertakings identified in Exhibit B will not require review by FHWA, the SHPO, or the ACHP, so long as they are reviewed by a WSDOT Cultural Resources Specialist and all terms and conditions set forth in this stipulation and Exhibit B are satisfactorily met. In situations where undertakings meet the terms and conditions of this stipulation and Exhibit B but portions of the undertaking are located on tribal or federal property, such as county-wide safety projects, WSDOT will apply the exemption[s] for the non-Tribal or federal property and conduct Section 106 review for the Tribal or federal portion of the undertaking.

B. Any signatory to this Agreement may request a revision to Exhibit B. Revisions to Exhibit B may be made and will go into effect upon the written agreement of the signatories to this Agreement. Such revisions do not require that this Agreement be formally amended; however, WSDOT shall provide a clean copy of the revised Exhibit B, clearly identifying the date it became effective, to the signatories for their files. Additional activity types are acceptable provided that as with any other undertaking so treated by this Agreement, the procedure contained in Stipulation V and Exhibit B shall not apply if at any time in the course of the undertaking information becomes available that would make the procedure inapplicable, including but not limited to the discovery of historic properties or human remains.

VI. EMERGENCY UNDERTAKINGS

WSDOT, on behalf of FHWA, will carry out the requirements of 36 CFR 800.12(b), with the following exception as provided by §800.12(b)(2). When a disaster or emergency has been declared by the President or the Governor, or if WSDOT issues a declaration of emergency in accordance with RCW 47.28.170 and WAC 468-12-880, and an immediate threat to life or property requires emergency operations by WSDOT that affect or may potentially affect the character or use of historic properties, WSDOT shall notify FHWA, SHPO, affected tribes and the ACHP within 7 days of commencing the emergency undertaking. Consultation, including the opportunity to review and comment on the emergency undertaking, shall be conducted as soon as possible to determine how to proceed in a fashion that will secure, as fully as practicable under the circumstances, compliance with Section 106 of the National Historic Preservation Act.

VII. PROGRAMMATIC SECTION 106 REVIEW PROCESS

For those projects not exempted from Section 106 review under terms of Stipulation V, the following process shall be followed:

A. Initiation of Section 106 Review Process

WSDOT will be responsible for establishing the undertaking and initiating the Section 106 Review Process in accordance with this Agreement.

B. Identification and Evaluation of Historic Properties

1. Determine and Document the Area of Potential Effects

   WSDOT shall determine and document for each undertaking the Area of Potential Effects, in consultation with SHPO and any other consulting parties in accordance with §800.4. The purpose of the Area of Potential Effects is to assure that the scoping and execution of the Cultural Resources Survey is suited to the undertaking for its purposes of considering effects on historic properties. A WSDOT CRS must approve the APE and documentation, and the CRS is responsible for consulting with SHPO about the APE. Guidance on determining and documenting the Area of Potential Effects is contained in Exhibit C, Preparation of the Determination of the Area of Potential Effects.

2. Identify Historic Properties and Prepare the Cultural Resources Survey Report

   a. WSDOT shall complete or cause to be completed the identification of historic properties that may be affected by the undertaking in accordance with 36 CFR 800.4. The purpose of the Cultural Resources Survey is to review existing information and seek new information on historic properties that may be in the Area of Potential Effects, identify and evaluate those historic properties and their eligibility for listing in the National Register of Historic Places, and consider the effects the undertaking will have on them.

b. WSDOT shall document the identification of historic properties through the efforts of one or more of its Cultural Resources Specialists and other WSDOT staff collaborating with them, an inter-governmental contract with staff from Tribes or through the services of a consultant or consultants meeting the Secretary of Interior's Professional Qualification Standards. Guidance on conduct of the Cultural Resources Survey and preparation of the survey report is contained in Exhibit D, Preparation of the Cultural Resources Survey Report.

c. Engagements of consultants to assist WSDOT in preparation of materials for use in the Section 106 review process shall conform to the applicable requirements of Exhibit D, and shall in all cases the proposed scope of work and budget is to be reviewed by a WSDOT Cultural Resources Specialist prior to the commencement of a consultant's services.

C. Findings of No Historic Properties Affected

If WSDOT, through preparation of the Cultural Resources Survey Report on behalf of FHWA, and in accordance with 36 CFR 800.4(d)(1), finds that either there are no historic properties present or the undertaking will have no effect upon historic properties, WSDOT shall submit documentation required by the implementing regulations to SHPO and all consulting parties. SHPO will respond within 30 days of receipt of WSDOT's submission of an adequately documented finding. If SHPO objects to the finding, the documentation will be submitted to FHWA for resolution. If an Indian tribe objects to the finding, it may first request direct consultation with FHWA to resolve the disagreement, or it may ask the ACHP to review the finding. If, through consultation, FHWA, SHPO and WSDOT reach consensus, the process will move forward in accordance with this Agreement, either to a finding of effect or documentation that no historic properties are affected. If consensus is not achieved, the failure to reach consensus will be addressed in accordance with the process described in 36 CFR 800.4.

D. Assessments of Effect on Historic Properties

If WSDOT on behalf of FHWA makes, and SHPO concurs in, a determination that historic properties may be affected, the Criteria of Adverse Effect set forth in § 800.5 will then form the basis for determining whether there is an adverse effect. WSDOT shall apply the Criteria of Adverse Effect at 36 CFR 800.5(a) to any historic property eligible for listing in the National Register of Historic Places in consultation with SHPO.

1. Finding of No Adverse Effect

If WSDOT proposes that the undertaking will have no adverse effect on historic properties, WSDOT shall submit documentation required by 36 CFR Part 800 to SHPO, affected tribes, and all other consulting parties. If SHPO, nor another consulting party (including affected tribes), does not object within thirty calendar days, WSDOT shall maintain and make available to the public the finding, and FHWA responsibilities under Section 106 are fulfilled. If any consulting party objects within 30 days of receipt of an

adequately documented finding of no adverse effect, WSDOT will notify FHWA and FHWA will ensure the Section 106 process is completed on the undertaking in accordance with 36 CFR 800.5(c)(2).

2. Finding and Resolution of Adverse Effects

   a. If WSDOT determines an undertaking may have an adverse effect on historic properties, it will initiate further consultation with the SHPO, interested Indian tribes, and other consulting parties that may be identified, to resolve the adverse effects in accordance with § 800.6. WSDOT on behalf of FHWA shall consult with SHPO and other consulting parties to develop and evaluate alternatives or mitigation that could avoid, minimize, or mitigate adverse effects of the undertaking to historic properties. Such alternatives or mitigation will be settled upon in a Section 106 Memorandum of Agreement executed by FHWA, WSDOT, and SHPO. FHWA will ensure the Section 106 review process is completed, including notification of the ACHP, in accordance with 36 CFR 800.6(a). If the ACHP chooses to participate in consultation it must also be a signatory to the MOA.

   b. If WSDOT, FHWA, and SHPO fail to reach agreement on the resolution of adverse effects following the process in Stipulation VII.3.a above, FHWA shall request the ACHP to join the consultation in accordance with 36 CFR 800.6(b)(1)(v). If the parties are still unable to agree on the terms of a Memorandum of Agreement, either FHWA, SHPO, or the ACHP may terminate consultation and request Council comment in accordance with 36 CFR 800.7.

E. Retrospective Review

For projects that have not yet proceeded to construction, site-specific cultural resource investigations, surveys and reports used to support the Section 106 review process that are five or more years old will be re-evaluated by WSDOT. The purpose of this re-evaluation is to establish whether, with the benefit of additional information gathered in the undertaking or otherwise over the passage of time, such materials accurately and correctly characterize the sites under review. This re-evaluation includes the undertaking in its final design, the Area of Potential Effects, and all historic properties present within the APE. Depending upon the results of the re-evaluations conducted pursuant to this paragraph, the re-evaluation may be submitted to FHWA for concurrence and SHPO for comment and shall be made available to the public upon request.

VIII. POST REVIEW DISCOVERY

If a plan for subsequent discoveries is not in place, and there is an inadvertent discovery of a historic property or human remains during construction of an undertaking, WSDOT will stop construction in the immediate vicinity of the discovery, notify appropriate authorities, and follow the procedures outlined in 36 CFR 800.13. If human remains are discovered on federal land, their treatment is determined by the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA–25 USC 3001 et seq.), with the federal land management agency

taking the lead. If human remains are discovered on non-federal lands, their treatment is determined by the provisions of the state Human Remains Act (Chapter 68.50 RCW) and the Indian Graves and Records Act (Chapter 27.44 RCW).

In ordinary circumstances, the parties should seek to include in any Section 106 Memorandum of Agreement prepared for an undertaking, a plan for dealing with post review discoveries. Post review discovery of historic properties without prior planning requires re-initiating the Section 106 process at the appropriate step pursuant to this Agreement.

IX. DOCUMENTATION STANDARDS

All documentation that supports findings and determinations made under this Agreement must be consistent with 36 CFR 800.11.

X. DISPUTE RESOLUTION

A. Staff employees at FHWA, WSDOT and SHPO will work together on implementation of this Agreement, and will attempt to resolve at their level disputes involving these signatory agencies or consulting parties. Disputes or disagreements may involve individual undertakings covered by this Agreement, or any action proposed under this Agreement or the manner in which the terms of this Agreement are implemented. In the event that agreement cannot be reached at the staff level and prior to formal reference of the matter to FHWA, and to the ACHP under §800.6 with respect to an adverse effect, WSDOT will convene a process to attempt in good faith to reach an agreement made personally and directly by the individuals serving as the state Secretary of Transportation, the SHPO, and the FHWA Division Administrator for Washington State. If the dispute involves a historic property of traditional cultural and religious significance to an Indian tribe, that tribe shall be invited to participate in the dispute resolution process through means that are appropriately suited to government-to-government consultation.

B. If a dispute raised by any consulting party cannot be resolved in the above-described manner, WSDOT will initiate a formal action to refer the dispute to FHWA, which will then take the lead in dispute resolution. Should FHWA determine that such dispute cannot be resolved, FHWA will:

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

   2. If the ACHP does not provide its advice regarding the dispute within the thirty (30) day time period, FHWA may make a final decision on the dispute and proceed accordingly.

Prior to reaching such a final decision, FHWA shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and concurring parties to this Agreement, and provide them and the ACHP with a copy of such written response.

3. FHWA's responsibility to carry out all other actions subject to the terms of this Agreement that are not the subject of the dispute remain unchanged.

XI. PROFESSIONAL STANDARDS AND USE OF CONTRACTORS

WSDOT must ensure that all its actions in the Section 106 review process are taken by, in collaboration with, or under supervision of WSDOT staff who meet the professional qualifications standards under regulations developed by the Secretary of the Interior so as to meet WSDOT's responsibilities for the protection of historic properties including archaeological and cultural resources.

WSDOT may use the services of consultants to prepare information, analyses and recommendations under this Agreement. WSDOT, as FHWA's delegate, is responsible for the work products consultants prepare for this purpose. FHWA remains ultimately responsible for purposes of Section 106 for findings and determinations made by WSDOT based on consultant work. FHWA is also ultimately responsible that studies, documents or tasks prepared or performed by a non-WSDOT party for purposes of the Section 106 review process meet all applicable standards.

XII. ADMINISTRATION AND ONGOING PERFORMANCE REVIEWS

A. Reviews of the Use of Stipulation V and Other Section 106 Implementation Topics

1. Every three months, WSDOT shall prepare for FHWA and SHPO a list of undertakings on which WSDOT has proceeded without further Section 106 review, in reliance on the procedure pursuant to Stipulation V and Exhibit B of this Agreement. The lists shall be made available to the public and distributed to all consulting parties, including Tribes, who notify WSDOT of the desire to be supplied with the lists.

2. WSDOT headquarters staff, SHPO and FHWA will consult to determine if annual review is needed to consider the conduct of the Section 106 program for federal aid highway undertakings. FHWA, in its annual letter to the tribes pursuant to Stipulation IV(D) of this Agreement, will invite tribal input for consideration. FHWA will notify ACHP of any review meetings and the ACHP may participate at its discretion. Through these reviews performance measures may be adopted for purposes of accountability and reporting to interested parties.

3. Each WSDOT region and Washington State Ferries (WSF) shall on an annual basis conduct outreach to Indian tribes in order to review ongoing effectiveness of this Agreement with regards to tribal consultation, and to discuss upcoming projects. Indian tribes with reservations in the WSDOT region or administrative area of WSF, and tribes

with areas of interest that intersect with the region or administrative area, shall be included in this outreach. The manner of outreach will be determined by each WSDOT region and WSF, in conjunction with affected tribes, with the objective of effective, meaningful consultation.

B. Training

WSDOT and FHWA will conduct training in cultural resources management and Section 106 implementation requirements and procedures, both for Cultural Resources Specialists and for other employees. Details of training curricula and their use will be provided to SHPO as part of the annual review of the program.

XIII. AMENDMENT

Any signatory party to this Agreement may request that it be amended, whereupon the parties will consult to consider such an amendment. This Agreement shall only be amended by a written instrument executed by all the signatory parties.

XIV. TERMINATION

Any party to this Agreement may terminate it by providing a 30 calendar day notice in writing to the other parties, provided that the parties will consult during the period prior to termination to seek agreement on amendments and other actions that would avoid termination. In the event of termination, FHWA will comply with the requirements of 36 CFR Part 800 with regard to individual undertakings otherwise covered by this Agreement.

XV. DURATION

This Agreement shall become effective upon execution by FHWA, WSDOT, SHPO, and the ACHP; and it shall continue in full force and effect for five (5) years, or until it is amended or terminated as provided above. Before the end of the five-year term, FHWA will consult with the WSDOT, SHPO, and the ACHP to determine interest in renewing this Agreement. The Agreement may be extended for an additional term upon the written agreement of the signatories.

SECOND AMENDED
PROGRAMMATIC AGREEMENT

Implementing Section 106 of the National Historic Preservation Act for the Federal-aid Highway Program in Washington State Administered by the Federal Highway Administration

SIGNATURES

Execution and implementation of this Programmatic Agreement has evidenced that the Federal Highway Administration has afforded the ACHP an opportunity to comment on the Federal-aid Highway Program in Washington State and that FHWA has taken into account the effects of the undertakings on historic properties.

Daniel M. Mathis
Division Administrator
Federal Highway Administration

Date: 07/13/12

Allyson Brooks, Ph.D.
State Historic Preservation Officer
Washington State Department of Archaeology & Historic Preservation

Date: 7/26/12

John M. Fowler
Executive Director
Advisory Council on Historic Preservation

Date: 8/2/12

Paula Hammond
Secretary of Transportation
Washington State Department of Transportation

Date: 6/12/12

Exhibit A

Tribes Consulted with on Amended Statewide Programmatic Agreement[4]

There were 29 federally-recognized and 4 non-federally-recognized Washington state tribes, and 5 federally-recognized out-of-state tribes, invited to consult on this agreement. Of those, the list below represents the tribes who responded to the invitation and were actively consulted.

Washington State Tribes

Chehalis Confederated Tribes
Colville Confederated Tribes
Cowlitz Indian Tribe
Jamestown S'Klallam Tribe
Kalispel Tribe
Lower Elwha Klallam Tribe
Puyallup Tribe
Skokomish Tribe
Spokane Tribe
Squaxin Island Tribe
Stillaguamish Tribe
Suquamish Tribe

Out-of-state Tribes
Confederated Tribes of the Umatilla Indian Reservation
Confederated Tribes of Grand Ronde Community of Oregor
Confederated Tribes of Warm Springs
Nez Perce Tribe

[4] This Exhibit is part of a Programmatic Agreement titled, *Implementing Section 106 of the National Historic Preservation Act for the Federal-aid Highway Program in Washington State Administered by the Federal Highway Administration*, between the Washington State Department of Transportation, the Federal Highway Administration, the Department of Archaeology and Historic Preservation and the Advisory Council on Historic Preservation.

Exhibit B

Undertakings Presumed to Have Minimal Potential to Cause Effects[5]

Federal-aid highway funds are routinely used for highway and ferry system undertakings that are types of activities that have minimal potential to cause effects on historic properties; therefore further Section 106 review is not necessary. An undertaking of one or more of the types listed below will not require further Section 106 review with SHPO or FHWA once the undertaking has been reviewed by a WSDOT Cultural Resources Specialist to ensure that the location or nature of the activity is such that it is unlikely to affect a historic property. However, if at any time in the course of the undertaking information becomes available that would make this procedure inapplicable, including but not limited to the discovery of historic properties or human remains, Section 106 review shall be initiated by WSDOT on behalf of FHWA in accordance with Stipulation VII of this Programmatic Agreement.

A. HIGHWAYS AND BRIDGE ACTIVITIES PRESUMED TO HAVE MINIMAL POTENTIAL TO CAUSE EFFECTS:

A-1 Roadway surface replacement, overlays, shoulder treatments, rumble strips, pavement repair, seal coating, pavement grinding, and pavement marking that do not expand the existing wearing surface.

A-2 Installation, replacement, or repair of safety appurtenances and traffic control devices including but not limited to glare screens, snow and ice detectors, energy attenuators, cameras, lighting, signs, signals, and informational signage/kiosks; provided the activity does not include ground disturbance.

A-3 Fencing provided no grading is involved.

A-4 Landscaping or revegetation on shoulders, fill slopes, and backslopes.

A-5 In-kind repair or replacement of curb and gutter, sidewalks and catch basins, and components of NRHP bridges not considered character defining.

A-6 In-kind emergency repairs to maintain the structural integrity of a bridge or roadway, and to remove landslide and rockslide material from travel lanes and shoulders.

A-7 Hazardous waste removal and disposal that requires immediate removal within the demonstrated vertical and horizontal limits of previous construction or disturbance.

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[5] This Exhibit is part of a Programmatic Agreement titled, *Implementing Section 106 of the National Historic Preservation Act for the Federal-aid Highway Program in Washington State Administered by the Federal Highway Administration*, between the Washington State Department of Transportation, the Federal Highway Administration, the Department of Archaeology and Historic Preservation and the Advisory Council on Historic Preservation.

A-8 Work within existing permitted material source pits, quarries or other borrow sources; or borrow pits that have been previously inventoried by WSDOT and where no cultural resources were identified.

A-9 Stripping and painting of bridges.

A-10 Replacement of bridge expansion joints.

A-11 Bridge deck pavers and striping projects.

A-12 Removal of vegetation or fallen rock in the clear zone along a roadway.

A-13 Work within interchanges or within medians of divided highways, within the demonstrated vertical and horizontal limits of previous construction or disturbance.

A-14 Work between a highway and an adjacent frontage road within the demonstrated vertical and horizontal limits of previous construction or disturbance.

A-15 Replacement or extension of culverts and other drainage structures with waterway openings which do not extend beyond the vertical and horizontal limits of previous construction or disturbance for the existing culvert or drainage structure.

A-16 New installation, or replacement or repair of cameras, lighting, signs, signals, and other traffic control devices, guardrails, barriers, and informational signage/kiosks, provided the associated ground disturbance is within the demonstrated vertical and horizontal limits of previous construction or disturbance.

A-17 Construction of turning lanes and pockets, auxiliary lanes (e.g., truck climbing, acceleration and deceleration lanes), sidewalks, and shoulder widening within the demonstrated vertical and horizontal limits of previous construction or disturbance.

A-18 Slope flattening by placement of fill material on the side slopes of intersection crossroads and accesses to meet safety criteria and other slope flattening done within the demonstrated vertical and horizontal limits of previous construction or disturbance.

A-19 Placement of riprap or other erosion control method to prevent erosion of waterways and bridge piers within the demonstrated vertical and horizontal limits of previous construction or disturbance.

A-20 Construction activities in areas of continuous slides, other mass wasting, or unstable landforms as evidenced by geotechnical core samples or other geotechnical evaluation.

A-21 Roadway widening within the demonstrated vertical and horizontal limits of previous construction or disturbance

A-22 Installation of bicycle and pedestrian lanes, paths, and related facilities within the demonstrated vertical and horizontal limits of previous construction or disturbance.

A-23 Trenching or other excavation to install, replace, or repair electrical, water, sewer lines, fiber optics, telephone cable, or other utilities in areas demonstrated to have been previously disturbed by construction, fill, or prior trenching activities.

A-24 Construction staging areas or other locations proposed for temporary use during construction within the demonstrated vertical and horizontal limits of previous construction or disturbance.

A-25 Geotechnical borings, data collection, and non-invasive environmental sampling required to support the planning or design of an undertaking.

A-26 Soil pits dug by hand using shovels or augers for delineating wetland boundaries or characterizing wetland soils.

A-27 Borrowing of rock and rock removal and stabilization activities (e.g. rock scaling, bolting) within existing rights-of-way.

B. WASHINGTON STATE FERRIES TERMINAL ACTIVITIES PRESUMED TO HAVE MINIMAL POTENTIAL TO CAUSE EFFECTS:

B-1 Minor repair and maintenance activities necessary for continued safe operation of terminal facilities including, but not limited to: repair and maintenance of wingwall rub timbers and polyethylene fender panels; wood, steel, and polyethylene dolphin fender panels; cross bracing; hanger bars; transfer spans; bolting and lashing on dolphins and other offshore structures; counterweight cables; repair and replacement of existing anchor chains and anchors associated with floating dolphins and wing dolphins; and repair to existing structures located on the dock that are less than 40 years of age.

B-2 Replacement of existing structures including, but not limited to, bridge seat, towers, wingwalls, dolphins, and overhead loading and passenger walkway facilities.

B-3 Repair and replacement of trestles including decking, stringers, pile caps, and piling supporting the trestle, provided there is no expansion of the trestle.

B-4 Repair and replacement of bulkheads of the same size and location.

B-5 Asphalt and gravel parking and roadway surface replacement, overlays, pavement repair, rumble strips, seal coating, pavement grinding, and repair or installation of sidewalks, which do not expand the existing wearing surface.

B-6 Fencing and installation of security/safety gates in existing right of way, provided no grading is involved.

B-7 Landscaping on shoulders, fill slopes and backslopes of off-site holding areas, terminals, and associated roadways.

B-8 Installation, replacement, or repair of safety appurtenances, and traffic control and informational devices, including but not limited to, cameras, lighting, signals, informational signage/kiosks, signs, glare screens, snow and ice detectors and energy attenuators; provided the activity does not include ground disturbance.

B-9 Repair or replacement of curb and gutter, sidewalks and catch basins.

B-10 Emergency repairs to maintain the structural integrity of a structure.

B-11 Geotechnical borings, data collection, and non-invasive environmental sampling required to support the planning or design of an undertaking.

B-12 Trenching or other excavation to install, replace, or repair electrical, water, sewer lines, fiber optics, telephone cable, or other utilities in areas demonstrated to have been previously disturbed by construction, fill, or prior trenching activities.

B-13 Installation of cameras, lighting, signals, informational signage/kiosks, signs and other traffic control and security devices, guardrails, barriers, and repair and replacement of such devices, provided the associated ground disturbance is within the demonstrated vertical and horizontal limits of previous construction or disturbance.

B-14 Installation of bicycle and pedestrian lanes, paths and facilities within the demonstrated vertical and horizontal limits of previous construction or disturbance

Exhibit C

Preparation of the Determination of the Area of Potential Effects[6]

The term "Area of Potential Effects" is specifically drawn from the federal regulations implementing Section 106 that have been promulgated by the Advisory Council on Historic Preservation:

> Area of Potential Effects means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by an undertaking.

Determining an undertaking's Area of Potential Effects

The initial determination of the Area of Potential Effects is made by WSDOT under a delegation from FHWA as the *agency official* stated in the regulations. *Who* at WSDOT actually produces the determination will vary from undertaking to undertaking depending on the specific circumstances. Generally, the responsibility will be discussed and assigned as a part of the overall responsibility for a project's permitting process, since the Section 106 review is akin to a project permit requirement.

The importance of Section 106 review requires that a project manager plan for and provide appropriate resources as set forth in WSDOT's internal executive order E.1032.00, *Project Management.* This includes assuring that a Cultural Resources Specialist takes oversight responsibility from an early stage for the determination of the Area of Potential Effects. In some cases, it will be necessary and appropriate for a Cultural Resources Specialist to actually take a lead role in the preparation of the determination of the Area of Potential Effects. These judgments of resources and responsibilities must be made in on-going collaboration among project managers and region and headquarters Section 106 processing and supervisory staff in the Environmental Services Office. At a minimum, a Cultural Resources Specialist will review and concur with the determination prior to it being sent to SHPO, Tribes, and consulting parties.

Special considerations for determining the Area of Potential Effects resulting from WSDOT's ongoing relationships with Tribes

A suitable determination of an Area of Potential Effects requires taking account of a large number of factors, including an undertaking's potential for effects on properties of religious or cultural significance to Tribes. Consultation with Tribes within the Section 106 review is an important step in informing WSDOT of such matters, concurrent with consultation with SHPO. However, even before a Section 106 review formally commences, other forums for government-

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[6] This Exhibit is part of a Programmatic Agreement titled, *Implementing Section 106 of the National Historic Preservation Act for the Federal-aid Highway Program in Washington State Administered by the Federal Highway Administration*, between the Washington State Department of Transportation, the Federal Highway Administration, the Department of Archaeology Historic Preservation and the Advisory Council on Historic Preservation.

to-government consultation between WSDOT and Tribes may provide opportunities for WSDOT to learn information that will be helpful in determining the Area of Potential Effects. The WSDOT Tribal Liaison Office should be drawn upon as a resource in these matters.

Determining the Area of Potential Effects

The context of this topic in the Code of Federal Regulations is short and helpful. It should be read and considered by WSDOT staff working on Area of Potential Effects determinations. This section of the regulations makes reference to the definition of Area of Potential Effects, and emphasizes the importance of establishing the likely presence of historic properties in the Area of Potential Effects, identifying them, and determining their likely nature and location. Here are some important general points:

- The Area of Potential Effects is necessarily determined before the systematic identification of historic properties begins. Accordingly, all of the historic properties in the project vicinity need not be known to initially establish the Area of Potential Effects. It is important at this point, however, to thoroughly understand the undertaking and the nature of its potential effects.

- The determination of the Area of Potential Effects should include indirect and well as direct effects.

- An Area of Potential Effects need not be a single contiguous area but may consist of more than one area, depending on the specific features of the undertaking.

- The determination of the Area of Potential Effects should address all project alternatives. Different alternatives may have different Areas of Potential Effects. Also, the Area of Potential Effects need not necessarily be uniform for all kinds of effects; a single undertaking may have different Areas of Potential Effects for different kinds of effects.

- An Area of Potential Effects is not defined or limited by boundaries of land ownership.

- An Area of Potential Effects should be envisioned in three dimensions and must include all areas of horizontal and vertical ground disturbance.

- The determination of the Area of Potential Effects must be reconsidered if there are changes to the undertaking during project development. The Area of Potential Effects may need to be modified or changed (e.g., expanded or contracted) during the course of an undertaking and if so, additional consultation may be necessary. Any subsequent changes to the Area of Potential Effects shall be documented and consulting parties notified, and the consultant performing the cultural resources survey, if applicable.

Key points to consider when developing the determination of the Area of Potential Effects

The following are some of the points that should be considered:

1. Areas of potential soil disturbance

   - Areas where soil will be disturbed including soil to be removed from the site and soil to be placed on the site, and the depth of proposed excavation.

   - Pit and quarry sites and locations for soils and other materials when reasonably foreseen at the time of project development.

   - Potential landscaping areas, including clearing and grubbing.

   - Areas where heavy equipment operations may disturb soils.

   - Areas to be used for storm water facilities.

   - Wetland mitigation areas.

2. All locations at which elements of the undertaking can have direct or indirect effects:

   Direct impacts to historic and cultural resources like demolition of buildings or reconstruction of bridges are a clear consideration in the determination of the Area of Potential Effects. Direct impacts also include, whether from an undertaking's construction or operation, any visible, audible or atmospheric (meaning dust or debris) effects to historic properties. This is easily seen within historic districts where great care may have been taken to restore buildings and streets. Indirect effect also must be considered. For example, an undertaking may lead to construction or operation noise effects on secluded historic park properties or tribal cultural areas where serenity is a defining attribute of the historic property. Or trail construction near an archaeological site may introduce visitors who would threaten damage to artifacts. The determination of the Area of Potential Effects also needs to consider the effects of vibration, dewatering, settlement, oxidation, site truncation, and liquefaction (as appropriate for the nature of the project). In these and similar cases, the Area of Potential Effects should be drawn to assure these historic properties are identified, their eligibility for listing in the National Register of Historic Places determined, and the undertaking's potential effects on the historic properties evaluated.

3. All construction of staging areas and detour routes, and areas acquired for right of way.

   - Ground disturbance at areas used for equipment and materials staging must be considered in the determination of the Area of Potential Effects. If you do not know

where (or if) staging will take place, state within the text of the Area of Potential Effects documentation that the project contractor may or will designate a staging area.

- Proposed construction-phase detour routes and impacts from detouring traffic must be considered. If you know traffic patterns are going to change, this must be included in the Area of Potential Effects determination.

- Proposed new right of way will almost always be included in the Area of Potential Effects.

Documentation of the determination of the Area of Potential Effects

The Area of Potential Effects documentation must be straightforward to the reviewers at SHPO and FHWA and to the consulting parties, including any affected Tribes. WSDOT staff (and consultants, if any) and all consulting parties must understand the determination of the Area of Potential Effects for the purpose of preparing and reviewing the Cultural Resources Survey and subsequent steps in the Section 106 review process. Staff preparing the Area of Potential Effects package must understand and observe confidentiality requirements and restrictions on public disclosure under 36 CFR 800.11(c), which requires the withholding of information from public disclosure when disclosure would cause a significant invasion of privacy, risk harm to the historic property, or impede the use of a traditional religious site by practitioners.

Documentation for the Area of Potential Effects may include (tiered as necessary based upon the scale, sensitivity and nature of the undertaking):

- A textual description of the Area of Potential Effects that includes at least (where applicable) a description of its location by township, range and section, and a detailed location map with the Area of Potential Effects boundaries superimposed on a USGS 7.5 minute quadrangle map, or a map from the Department of Natural Resources base map series, showing comparable detail. Roads, streams, railroads and other landmarks should be located and keyed on the map, although this will depend on the undertaking and the scale of the Area of Potential Effects

- Photographs of the Area of Potential Effects and its surroundings. Aerial photographs should be included if available. Include captions with photographs.

- A discussion of known historic resources within or near the Area of Potential Effects.

- A written record of any field visits, including observations concerning landmarks, buildings approaching fifty years or older in age, and other evident historic or other culturally significant features.

- A written record of communications with other governmental jurisdictions (for example, cities or counties), Tribes, or local organizations (for example, local historical societies or tribal cultural resources offices) consulted in the determination of the Area of Potential Effects.

- A written record of any literature review used in preparing the determination of the Area of Potential Effects.

- A written record of any communication with FHWA or SHPO concerning the determination of the Area of Potential Effects.

The assigned WSDOT Cultural Resources Specialist will be consulted to assist in preparing the documentation outlined above. If the Region or Mode does not have a dedicated Cultural Resources Specialist, contact the WSDOT Cultural Resources Program for assistance.

Some Tribes are establishing their own databases and can be contacted for information on potential resources that may aid the preparation of documentation.

Exhibit D

Documentation of the Cultural Resources Survey[7]

Careful documentation and professional review of the results of the Cultural Resources Survey are essential to effectively conduct the Section 106 review process.

The Cultural Resources Survey report should (1) review existing and gather new information on historic properties that are in the Area of Potential Effects, (2) identify and evaluate historic properties and their eligibility for listing in the National Register of Historic Places, and (3) consider the effects the undertaking will have on them, commensurate with the scale and nature of the undertaking.

The scope of work and budget of the Cultural Resources Survey report must be approved by a WSDOT Cultural Resources Specialist before the contract or task order is signed. The scope of work must be specifically suited to the scale and nature of the undertaking and the Area of Potential Effects.

Preparation of the Cultural Resources Survey Report

For federal-aid highway projects funded by FHWA, the day-to-day work of carrying out the Section 106 process generally is delegated to WSDOT subject to the ultimate responsibility of the FHWA. Accordingly, WSDOT staff qualified as a Cultural Resources Specialist[8] must take responsibility for the preparation of the Cultural Resources Survey report. The preparation of the Cultural Resources Survey report can be performed in-house by a WSDOT Cultural Resources Specialist (other WSDOT staff may assist and support the work in appropriate ways) or by a qualified consultant engaged by WSDOT whose report is submitted to a WSDOT Cultural Resources Specialist for review prior to submittal to SHPO, FHWA, and the tribes.

WSDOT staff who are not Cultural Resources Specialists, such as project managers or project permitting managers, may perform day-to-day administrative management of staff or consultants performing the tasks of the Cultural Resources Survey. WSDOT staff may also assist with research, field work support, mapping and graphics and so on. However, a WSDOT Cultural Resources Specialist must take responsibility for endorsing the professional suitability and findings of the Cultural Resources Survey report. This endorsement must be based, as circumstances reasonably allow, on first hand review of the work and on representations reasonably made and accepted concerning the work whether performed by other WSDOT staff or by consultants.

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[7] This Exhibit is part of a Programmatic Agreement titled, *Implementing Section 106 of the National Historic Preservation Act for the Federal-aid Highway Program in Washington State Administered by the Federal Highway Administration*, between the Washington State Department of Transportation, the Federal Highway Administration, the Department of Archaeology and Historic Preservation and the Advisory Council on Historic Preservation.

[8] A WSDOT Cultural Resources Specialist is a staff member who meets the Professional Qualifications Standards established by the Secretary of Interior. See the *Programmatic Agreement.*

Special considerations that apply when outside consultants are engaged to perform or assist in the preparation of the Cultural Resources Survey Report

When consultants are used by WSDOT for performing tasks in connection with a Cultural Resources Survey report, the following points must be observed:

- Professional responsibility for such tasks shall only be assigned to persons who are qualified for the work under the Professional Standards of the Secretary of Interior.
- Consultants may be engaged through project specific professional service procurements or by task order from an appropriate on-call consultant agreement.
- WSDOT shall provide to a prospective consultant a detailed written description of the Area of Potential Effects, and relevant documentation thereto as listed in Exhibit C, to be used by the consultant in preparing the scope of work.
- While the determination of eligibility for listing on the National Register of Historic Places and the determination of effects on a historic property are all ultimately the responsibility of FHWA and WSDOT pursuant to FHWA's delegation, a consultant performing a Cultural Resources Survey and preparing documentation must include recommendations as to those determinations for each historic property and provide the basis of professional judgment for such recommendations. Those recommendations must be reviewed and agreed upon by a WSDOT Cultural Resources Specialist. If the Cultural Resources Specialist does not agree with the Consultant's determinations, either further discussion between the Cultural Resources Specialist and the Consultant must take place until the issue is resolved or the Cultural Resources Specialist must prepare a cover letter to the Cultural Resources Survey report noting that WSDOT does not agree with the Consultant's determinations. The cover letter must include the Cultural Resources Specialist's determinations.
- Responsibility for consultation with Tribes in matters of the Section 106 review process is a government-to-government function that cannot be delegated by WSDOT to a consultant. A consultant may contact a Tribe on behalf of WSDOT in the preparation of a survey report, after proper introduction of the consultant to the Tribe has been made by WSDOT.

When to conduct the Cultural Resources Survey

The Section 106 consultation process should be begun in the first steps of project planning and the Area of Potential Effects for an undertaking should be determined as early in the course of project development as sufficient relevant information is available. Generally, the sooner that the background research for the Cultural Resources Survey and report is prepared, the better. This will mean that information necessary to guide the level of field work and the preparation of a Section 106 Memorandum of Agreement, if necessary, will be available so that preparation of the MOA can be coordinated with other mitigation issues and requirements emerging from other areas of project development.

The Programmatic Agreement and Section 106 implementing regulations and guidance encourage that the Section 106 process be integrated with environmental review under the National Environmental Policy Act. Project managers shall set clear understandings in the project management plan developed pursuant to WSDOT's internal Executive Order E.1032.00 *Project Management* for how the Section 106 review process and the environmental assessment process under federal and state law will be integrated. This requires early coordination and planning with the Cultural Resources Specialist for the Region or Mode, or with the WSDOT Cultural Resources Program.

Section 106 review requirements as to the effort made in the cultural resources survey report to identify historic properties

A reasonable and good faith effort commensurate with the scale and nature of the undertaking must be made to carry out appropriate identification efforts. The magnitude and nature of the undertaking and the degree of federal involvement should be given account. The appropriate level of effort may include background research, communication with consulting parties, field surveys, test excavation, and oral history interviews. The effort shall take into account past planning and project records, research and studies and other sources to help identify the likely location and nature of historic properties in the Area of Potential Effects. WSDOT Cultural Resources Specialists will assist with determining the level of effort likely to be needed to complete the Cultural Resources Survey report. When phased identification and evaluation of historic properties are appropriate for an undertaking (for example, in a major corridor planning process with multiple alternatives) special rules are provided that may allow for deferral of final identification and evaluation of historic properties under certain conditions.

The Section 106 review process specifically requires not only efforts to identify historic properties, but also a reasonable and good faith effort to identify affected Tribes that may attach religious or cultural significance to historic properties even if the Tribes are located at a distance from the undertaking so that these Tribes can be included in the consultation process[9]. For more information on this topic, consult the guidance prepared by the federal Advisory Council on Historic Preservation, *Consulting with Indian Tribes in the Section 106 Review Process* (updated August 22, 2005).

Known and potential Traditional Cultural Properties should be considered in the Cultural Resources Survey and addressed in the survey report, appendix, or separate document. Communications with Tribes as consulting parties should request information on Traditional Cultural Properties. Gathering information about Traditional Cultural Properties will involve government-to-government and/or staff-to-staff consultation with affected, federally recognized Tribes that must be carried out directly as the responsibility of WSDOT (with FHWA, as appropriate), even if the preparation of the cultural resources survey report has been assigned to an outside consultant. If it is necessary to interview elders or other members of recognized tribes to obtain information on unrecorded Traditional Cultural Properties, this work must be carefully managed through government-to-government consultation. The specific roles of WSDOT, its

[9] WSDOT Tribal Liaisons have a special role in helping to identify affected Tribes to be included in the consultation process.

staff and consultants, and tribal governments must be carefully described and mutually understood. Information obtained from tribal governments and tribal members on Traditional Cultural Properties may very likely be confidential and must be handled with due regard for not impeding the use of a traditional site by practitioners. Generally this will require that the responsibility for safeguarding confidential information must be directly undertaken by WSDOT in order to assure that tribal concerns are met for the protection and management of sensitive cultural resources. Subject to the foregoing, the Cultural Resources Survey report should contain adequate information and articulated grounds for professional judgment to support the various proposed determinations regarding Traditional Cultural Properties.

On large, complex ground-disturbing projects, WSDOT, in consultation with SHPO, will determine the survey methodology, including the potential need for a geomorphological assessment of the project area. A geomorphological assessment will consist of a consideration of the origin and evolution of the landforms within the project area and the processes that shaped them. The scale of a given project's geomorphological assessment will depend on a number of factors, including the archaeological/environmental sensitivity of landform, the depositional history of the area, and the amount of proposed ground disturbance. If needed, the assessment will be completed before determining the scope of work for the Cultural Resources Survey. On smaller projects, WSDOT will consider the need for, and perform, a geomorphological assessment as necessary based upon the nature of the project.

Elements that must be included in the scope of work for a Cultural Resources Survey Report

A scope of work should be prepared for every Cultural Resources Survey and report, whether performed by WSDOT staff or consultants, and approved by a WSDOT Cultural Resources Specialist. The content and level of detail of the scope of work will depend on the specific circumstances of the undertaking known at the time. At a minimum, the scope of work would ordinarily include the following and these elements should certainly be included in the scope of work of an engagement of a consultant:

- A description of the background and field work tasks, including an estimate of the level of effort and the budget to be assigned to each task.
- A plan for coordinating with consulting parties including appropriate coordination with Tribes as outlined in the federal Advisory Council on Historic Preservation guidance, *Consulting with Indian Tribes in the Section 106 Review Process* (updated August 22, 2005) prepared by the Advisory Council and meeting the interests of WSDOT's Tribal Liaison Office; as well as other parties such as local governments, depending upon the nature and location of the undertaking.
- The identification of who will be responsible for performing the specific tasks of the Cultural Resources Survey and report. Depending on the circumstances, the tasks may be performed by WSDOT Cultural Resources Specialists or other WSDOT staff under their supervision, or contracted to consultants, provided that in every instance the work required by federal law to be performed by cultural resources professionals is assigned to such persons.

Requirements for the collection of data and information to identify whether historic properties exist in the Area of Potential Effects

A review of existing information on historic properties within the Area of Potential Effects, including any data concerning possible historic properties not yet identified, will be conducted with the following in mind:

- The Cultural Resources Survey requires sufficient investigation into the history and background that would identify the relevant influences accounting for historic properties in the area; and demonstration of an understanding of the area's geology, historical period and prehistoric period habitation, geomorphology, ecology, and depositional environment, commensurate with the scale and nature of the undertaking.

- Information should be gathered from affected Tribes to assist in identifying areas, whether or not located on tribal lands, which may be of religious or cultural significance to the Tribe.

The Cultural Resources Survey Report

The Cultural Resources Survey report shall conform to all regulatory requirements of 36 CFR Part 800.11(d) and (e), as they relate to reporting findings of the presence of historic properties and effects upon them. The appropriate content of the report will depend on the scope of the undertaking and the Cultural Resources Survey, but a basic report will generally include the following:

- A cover sheet in the form supplied by the SHPO.

- A clear description of the undertaking, the Area of Potential Effects, and regulatory requirements to which the undertaking is generally subject.

- A description of the project location, using Section, Township, and Range; and a description of property ownership. USGS 7.5 minute quad maps will generally be appropriate with an inset of quad location in Washington State.

- Diagrams and plans illustrating the work and results of the Cultural Resources Survey, including sketch maps of specific locations of field inspections and sampling showing shovel test locations; transect paths, surface cultural resources, and prominent features. Such diagrams and plans should always include a scale, north arrow, inset location, and a caption.

- Expectations for potential historic properties in the Area of Potential Effects, for which inventory was not completed as in the case of phased identification and evaluation, or properties not yet eligible at the time of the survey that could become eligible during the life of the project due to a change in circumstances or advancing age, or portions of the project area that were not surveyed or tested due to restricted access.

- Methods of survey and testing of the Area of Potential Effects. The individuals conducting the survey should be identified. Field conditions at the time of the survey site visit[s] should be described.

- Results of field investigations must be reported with the appropriate level of information and documentation to meet the regulatory requirements of 36 CFR Part 800. All identified historic properties should be inventoried with enough information to demonstrate whether or not they are eligible for listing in the National Register of Historic Places.

- The National Register criteria shall be applied to properties identified in the Area of Potential Effects that have not been previously evaluated for National Register eligibility. This may include re-evaluation of properties previously determined eligible or ineligible and shall acknowledge the special expertise Tribes possess in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

- Photographs and figures should be included to illustrate the project area, results of subsurface testing, exposed features or soils, artifacts, project related structures, and any other subject relevant to the project.

- Recommendations for any additional work concerning identified historic properties should be stated at the end of the document.

- Determinations contained in the Cultural Resources Survey Report, when they are formally submitted to SHPO and other consulting parties, must be signed by a WSDOT Cultural Resources Specialist, even when reliance has been placed on the professional judgment of a consultant included in the Cultural Resources Survey Report.

- Archaeological Site form updates must be included if the survey has located or encountered recorded sites. In an appendix to the report and in a separate electronic submission, Washington State Historic Property Inventory Forms should be completed for identified historic buildings and structures. [10]

- Bibliographic and documentary sources for the survey must be clearly cited and listed in a 'Works Cited' or 'References' section at the end of the report.

A digital copy in PDF format and an adequate number of hard copies of reports must be submitted for circulation to FHWA, SHPO, WSDOT cultural resources staff, and other consulting parties, including Tribes. Consultation requires that all parties have an opportunity to review and comment on the report.

[10] The forms for hard copy and electronic reporting both for sites and historic buildings that meet SHPO's standards are provided by the Department of Archaeology and Historic Preservation.

Effective consideration of cultural resources and compliance with the Section 106 process

Project managers, planners, designers and Section 106 and environmental specialists should work collaboratively with Cultural Resources Specialists, the Tribal Liaison Office, and consultants, if engaged, to ensure that everyone understands the needs and purposes of the Cultural Resources Survey and report before it is prepared. The requirements for Section 106 compliance are not the same as for NEPA Discipline Reports, although the Section 106 Cultural Resources Survey Report can be used to support NEPA documentation. Many of the case-by-case issues presented in the preparation of a Cultural Resources Survey report may profitably be guided by *early and continuing* discussion with SHPO and this is to be encouraged with the *caveat* that everyone benefits from an organized collaboration with clear lines of communication and responsibility. The preparation of the Cultural Resources Survey report may also give rise to unique, case-by-case situations in working with other consulting parties, especially Tribes. Staff and consultants should always think to assure that the best resources available to WSDOT, including its own staff in several program areas as well as outside resources such as SHPO, are consulted and relied upon in these situations. When in doubt, ask, consult, and collaborate. Following these precepts will result in stronger documents leading to fewer requests for re-work and supplements and in the end will contribute to more efficient and effective completion of the Section 106 review process; and ultimately, to the timely and cost-effective delivery of transportation projects.