FIRST 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 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. 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. FHWA is responsible for assuring compliance with Section 106 in relation to the Federal-aid highway program. This Agreement provides specific details on how compliance with Section 106 will be carried out consistently within the larger scheme of delegation from FHWA to WSDOT; 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 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*. This Agreement replaces and supersedes that earlier agreement.

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. Under Section 101(d)(6) of the NHPA, historic properties of religious and cultural significance to Indian tribes[1] may be eligible for listing in the National Register of Historic Places. The NHPA also provides that consultation responsibilities of the FHWA as a federal

B. This Agreement does not apply to undertakings on tribal lands or to undertakings that may affect historic properties on tribal lands within exterior reservation boundaries and dependent Indian communities. FHWA and WSDOT are developing other agreements with individual Indian tribes which may include provisions that address undertakings on tribal lands.

C. It is a condition of entry into and continuing in effect of this Agreement that WSDOT employs professional staff meeting the Professional Qualifications Standards established by the Secretary of the Interior.[2] 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:

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[1] The term "Indian tribe" refers only to Federally-recognized Indian tribes per the National Historic Preservation Act and the regulations and only Federally-recognized Tribes have the right to participate in Section 106 consultations. However, non-recognized Tribes may be invited to participate in consultations based on a demonstrated interest in an undertakings effect on historic properties. See Advisory Council on Historic Preservation, *Consulting with Indian Tribes in the Section 106 Review Process* (updated August 22, 2005)

[2] *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.

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 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.

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. SECTION 106 RESPONSIBILITIES OF WSDOT AND FHWA

A. WSDOT Responsibilities

1. WSDOT shall define each undertaking in sufficient detail so that the Section 106 review can be conducted. Generally, the development of an undertaking by WSDOT will include early involvement of a Cultural Resources Specialist suited to the project 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.

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 a website, 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.B.4.

5. In consultation with SHPO, WSDOT shall identify any other parties entitled to be consulting parties and invite them to participate, including local governments and Indian tribes. Others may be invited as the Section 106 review process moves forward. A reasonable and good faith effort involving WSDOT tribal liaisons, 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.[3]

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.

B. 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.

[3] *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.

2. FHWA, or WSDOT on behalf of FHWA, shall ensure that it consults and coordinates with other federal agencies that have a regulatory or land management interest in undertakings going through the Section 106 review process. These agencies include (but are not limited to) the United States Army Corps of Engineers for projects requiring Section 10 or Section 404 permits, and the United States Forest Service for highway projects that cross national forests.

3. This Agreement does not govern the treatment of any undertaking for which federal funding is provided through the Federal Transit Administration, including any undertaking that jointly applies FHWA and Federal Transit Administration funding.

4. FHWA retains the ultimate decision-making authority and responsibilities for Section 106 compliance. FHWA will take appropriate action and reassess the application of this Agreement if WSDOT is found to be in non-compliance with this Agreement. 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.

IV. SPECIAL CONSIDERATIONS RELATING TO CONSULTATION WITH INDIAN TRIBES

A. FHWA shall ensure that WSDOT initiates and conducts consultation with Indian tribes for undertakings carried out under this Agreement. 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. 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.

B. It is important that WSDOT's consultation with Indian tribes be documented to meet the needs of FHWA and SHPO and that FHWA and SHPO be provided the opportunity to participate directly in such consultation on individual undertakings as the circumstances warrant. WSDOT shall keep FHWA and SHPO informed of the status of such consultation, provide advance notice of meetings so that FHWA and SHPO will have the opportunity to be represented in attendance if desired, and supply documents including meeting notes and correspondence to FHWA and SHPO, 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).

C. 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[4]. Accordingly, the parties recognize that consultation with Indian tribes is also carried out that is not related to the Section 106 process.

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, as defined in Exhibit B, are presumed to have minimal potential to cause effects to historic properties. Those undertakings identified in Exhibit B will not require review by FHWA, the SHPO, or the ACHP, so long as all terms and conditions set forth in Exhibit B are satisfactorily met. All other identified properties shall be evaluated in accordance with Stipulation VII.

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.

[4] *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.

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 the character or use of historic properties, WSDOT shall notify FHWA, SHPO, affected tribes and the ACHP within 48 hours 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, the protections of Section 106 of the National Historic Preservation Act.

VII. 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 § 800.3.

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. **Detailed guidance on determining and documenting the Area of Potential Effects is contained in Exhibit C, *Questions and Answers on 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 and prepare the *Cultural Resources Survey Report*. The purpose of the *Cultural Resources Survey Report* 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 prepare the *Cultural Resources Survey Report* through the efforts of one or more of its Cultural Resources Specialists and other WSDOT staff collaborating with them, 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, *Questions and Answers on 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 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 and make the documentation available for public inspection. If SHPO does not object to an adequately documented finding within thirty calendar days of SHPO's receipt of WSDOT's submission, WSDOT's responsibilities under Section 106 are fulfilled. But if SHPO does timely object, the documentation will be submitted to FHWA for resolution. If an Indian tribe does timely object, it may first request direct consultation with FHWA to resolve the disagreement, or it may ask the ACHP to either review the finding or request FHWA obtain a determination of eligibility for the property in question from the Secretary of the Interior. 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

1. 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.

2. 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 and make the documentation available for public inspection. If neither SHPO, nor another consulting party (including affected

tribes) objects within thirty calendar days, WSDOT shall maintain and make available to the public the finding, and its 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 consultation is completed on the undertaking in accordance with 36 CFR 800.5.

3. Finding and Resolution of Adverse Effects

   a. If, in consultation with SHPO, 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. If the ACHP chooses to participate in consultation, it must also be a signatory to the MOA. FHWA will ensure the Section 106 review process is completed, including notification of the ACHP, in accordance with 36 CFR 800.6(a).

   b. If either WSDOT, FHWA, and SHPO fail to reach agreement on the resolution of adverse effects following the process in Stipulation X, 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.

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 the discovery involves human remains and the appropriate authorities determine that the remains are historic or prehistoric Native American, the affected tribes will be contacted immediately. If such 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 such human remains are discovered on non-federal lands, their treatment is determined by the provisions of the state *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 §800.13(b).

IX. DOCUMENTATION STANDARDS

All documentation that supports findings and determinations made under this Agreement must be

X. DISPUTE RESOLUTION

A. Staff employees at FHWA, WSDOT and DAHP 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 servings as the state Secretary of Transportation, the state Director of the Department of Archaeology and Historic Preservation, 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 staff or contractors 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.

Consistent with applicable conflict of interest laws, 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. Semi-annual program review meetings will be held with WSDOT headquarters staff, SHPO and FHWA to consider the conduct of the Section 106 program for federal aid highway undertakings, the experience accumulating from the prior six months and expectations for the successful conduct of the program in the future. FHWA, in its annual letter to the tribes pursuant to Stipulation IV(D.) of this Agreement, will invite tribal input for use at the semi-annual program review meetings. FHWA will notify ACHP of the semi-annual 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, Washington State Ferries (WSF), and the Urban Corridors Office (UCO), 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 UCO, 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, WSF and UCO, 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 semi-annual review of the program.

C. 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 re-evaluation will include tribal consultation. 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. Any re-evaluations conducted pursuant to this paragraph shall be submitted to FHWA and SHPO for concurrence and shall be made available to the public upon request.

XIII. AMENDMENT

Any 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 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.

FIRST 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: 03/15/07

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

Date: 3/19/07

John M. Fowler
Executive Director
Advisory Council on Historic Preservation

Date: 3/4/07

Douglas B. MacDonald
Secretary of Transportation
Washington State Department of Transportation

Date: 3.13.07

Exhibit A

Tribes Consulted with on Amended Statewide Programmatic Agreement[1]

There were 29 federally-recognized and 7 non-federally-recognized Washington state tribes, and 4 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'Kallam Tribe
Lower Elwha Klallam Tribe
Lummi Nation
Nisqually Tribe
Nooksack Tribe
Puyallup Tribe
Samish Tribe of Indians
Sauk-Suiattle Tribe
Skokomish Tribe
Spokane Tribe
Squaxin Island Tribe
Stillaguamish Tribe
Suquamish Tribe
Swinomish Tribe
Tulalip Tribes
Yakama Nation

Out-of-state Tribes
Confederated Tribes of the Umatilla Indian Reservation

[1] 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[1]

Federal-aid highway funds are routinely used for highway and ferry system undertakings that are a type of activity 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, so long as the undertaking is limited to the types listed below, and is not a part of another undertaking. In addition, 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 in existing right of way, provided no grading is involved.

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

A-5 In-kind repair or replacement of curb and gutter, sidewalks and catch basins; at the same location.

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.

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

[1] 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.

B. HIGHWAYS AND BRIDGE ACTIVITIES PRESUMED TO HAVE MINIMAL POTENTIAL TO CAUSE EFFECTS, WITH ADDITIONAL SCREENING:

An undertaking of one or more of the types listed below will not require further Section 106 review with SHPO, so long as the undertaking: (1) is not adjacent to or within a historic property or historic district; (2) does not affect a bridge that is listed in or eligible for listing in the National Register of Historic Places; (3) does not involve soil disturbance within one-quarter mile of a known or recorded archaeological site; and (4) does not involve modification of a bridge or structure that is 40 or more years old. For each of the activities below, a WSDOT Cultural Resources Specialist shall determine if any of the above conditions apply (i.e., does the nature of the undertaking have any potential to affect these resources–properties, districts, bridges or sites?) If not, the undertaking will not require further Section 106 review. Also, consideration of whether or not there was a cultural resources survey conducted during original construction is factored in by the Cultural Resources Specialist. If WSDOT determines that one of these resources may be affected, in accordance with 36 CFR 800.4(d)(2), it will carry out the requirements of Stipulation VII.D. of this agreement.

B-1 Work on bridges of the National Highway System (NHS) and non-NHS state highways unless an inventory, evaluation or study by a Cultural Resources Specialist has shown the bridge to be significant.

B-2 Work within interchanges or within medians of divided highways, within the demonstrated vertical and horizontal limits of previous construction or disturbance.

B-3 Work between a highway and an adjacent frontage road within the demonstrated vertical and horizontal limits of previous construction or disturbance.

B-4 Replacement or extension of culverts and other drainage structures with waterway openings of 100 square feet or less and which do not extend beyond the vertical and horizontal limits of previous construction or disturbance for the existing culvert or drainage structure.

B-5 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.

B-6 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. This does not include staging areas in previously undisturbed areas.

B-7 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.

B-8 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.

B-9 Construction activities in areas of continuous slides, other mass wasting, or unstable landforms as evidenced by geotechnical core samples or other geotechnical evaluation.

B-10 Roadway widening within the demonstrated vertical and horizontal limits of previous construction or disturbance

B-11 Installation of bicycle and pedestrian lanes, paths and facilities within the demonstrated vertical and horizontal limits of previous construction or disturbance

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

B-14 Geotechnical borings (4 inches in diameter or less), data collection, and non-invasive environmental sampling required to support the planning or design of an undertaking.

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

C-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.

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

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

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

C-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.

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

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

C-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.

C-9 In-kind repair or replacement of curb and gutter, sidewalks and catch basins on the same location.

C-10 In-kind emergency repairs to maintain the structural integrity of a structure.

D. WASHINGTON STATE FERRIES ACTIVITIES PRESUMED TO HAVE MINIMAL POTENTIAL TO CAUSE EFFECTS, WITH ADDITIONAL SCREENING

An undertaking of one or more of the types listed below will not require further Section 106 review with SHPO, so long as the undertaking: (1) is not adjacent to or within a historic

property or historic district; (2) does not involve soil or sediment disturbance within one-quarter mile of a known or recorded archaeological site; and (3) does not affect a ferry system structure that is listed in or eligible for listing in the National Register of Historic Places. For each of the activities below, a WSDOT Cultural Resources Specialist shall determine if any of the above conditions apply (i.e., does the nature of the undertaking have any potential to affect these resources–properties, districts, bridges or sites?) If not, the undertaking will not require further Section 106 review. Also, consideration of whether or not there was a cultural resources survey conducted during original construction is factored in by the Cultural Resources Specialist. If WSDOT determines that one of these resources may be affected, in accordance with 36 CFR 800.4(d)(2), it will carry out the requirements of Stipulation VII.D. of this agreement.

D-1 Geotechnical borings (4 inches in diameter or less), data collection, and non-invasive environmental sampling required to support the planning or design of an undertaking.

D-2 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.

D-3 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.

D-4 Installation of bicycle and pedestrian lanes, paths and facilities within the demonstrated vertical and horizontal limits of previous construction or disturbance

Exhibit C

Questions and Answers on
Preparation of the Determination of the Area of Potential Effects[1]

Careful preparation of the determination of an undertaking's Area of Potential Effects and good documentation of that determination is essential for the effective conduct of the Section 106 review process.

What is meant by the "Area of Potential Effects?"

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.

Who makes the determination of 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.

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SHPO must be consulted in the determination of the Area of Potential Effects for those types of undertakings that are included in the list below. Generally this is achieved by providing the proposed Area of Potential Effects to SHPO, with a transmittal letter inviting review, comment, and concurrence.

Local governments may have jurisdiction over the area in which the effects of an undertaking may occur. Similarly, Indian Tribes may attach religious or cultural significance to properties affected by the undertaking. Accordingly, local governments and Indian Tribes are invited to be consulting parties in the determination of the Area of Potential Effects. The regulations specifically require that a "reasonable and good faith effort" be made to identify Tribes with such interests, whether or not the vicinity of the undertaking is on or close to tribal lands of current habitations. The project manager can seek guidance from environmental and cultural resources staff and tribal liaisons on whether to invite local government representatives and Tribes to consult on Area of Potential Effects determinations. In uncertain or unusual cases, SHPO should be consulted.

For certain projects (see below), concurrence by the SHPO with the determination of the Area of Potential Effects is required *prior to the preparation of the Cultural Resources Survey* (see Exhibit D):

- High-risk projects, that is, projects that have a probability of affecting shorelines of marine waters or major rivers habited in a prehistoric or historic era by Native Americans;
- Projects in active depositional zones (e.g., alluvial plains) where there is a question as to the depth of cultural resources and the potential impact of vertical disturbance;
- Projects, particularly in urban areas and on traditional cultural properties, that have significant potential noise or shadow effects;
- Projects in areas near or adjacent to previously recorded archaeological sites, or areas deemed to have a high probability for archaeological resources.
- Projects in areas that can reasonably be viewed as "sensitive", from a cultural resources standpoint, such as national landmarks; and
- Large scale ground-disturbing projects.

Do special considerations for determining the Area of Potential Effects result from WSDOT's ongoing relationships with Tribes?

Yes. 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-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.

What common points can be drawn from WSDOTs and SHPO's experience to assist staff in preparing good determinations of 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 must 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 discussed with DAHP, and the consultant performing the cultural resources survey, if applicable.

What are key points to consider when developing the determination of the Area of Potential Effects?

The following, drawn from recent experience, general background and a sense of emerging directions in Section 106 practice and concerns, 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.

    - WSDOT-owned pit and quarry sites and locations for soils and other materials, and any other such sites to be used by a contractor, when reasonably foreseen at the time of project development.

    - Potential landscaping areas, including clearing and grubbing.

    - Areas where heavy equipment operations may disturb soils.

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 properly be included in the Area of Potential Effects. Areas adjacent to new right of way also must be considered.

What should be included in the documentation of the determination of the Area of Potential Effects?

WSDOT and SHPO have identified the components of a complete Area of Potential Effects package (see below). The documentation must make the determination of the Area of Potential Effects and the basis on which it has been reached clear to reviewers at DAHP and FHWA and to 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 documentation of 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 is required to demonstrate the basis of the determination of the Area of Potential Effects and 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. Usually an adequate map will show one Section (one square mile) on an 8½-inch by 11-inch sheet of paper, although this will depend on the undertaking and the scale of the Area of Potential Effects
- Photographs should show the Area of Potential Effects and its surroundings. Aerial photographs should be included if available. Assure that photographs are captioned, orientation is marked, and key features of the Area of Potential Effects itself and of the surrounding context are labeled.

- A discussion of how the Area of Potential Effects is related to information on the website of the Department of Archeology and Historic Preservation. This discussion should include information on properties listed on the National Register of Historic Places or any counterpart state or local registers. The link to Department of Archaeology and Historic Preservation website for national and state registers is:

  http://www.oahp.wa.gov/pages/HistoricSites/Register.htm

- 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 following are resources for preparing the documentation outlined above:

Using the GIS system either at the WSDOT Cultural Resources Office, or the Department of Archaeology and Historic Preservation, check the databases for existing historical properties, archaeological sites, landmarks, etc.

WSDOT's Historic Bridge Inventories can be accessed via this hyperlink:

http://www.wsdot.wa.gov/fasc/EngineeringPublications/Manuals/EPM/456.pdf

The Department of Archaeology and Historic Preservation's online, searchable database for State and National Register properties can be accessed via this hyperlink:

http://www.oahp.wa.gov/pages/wisaardIntro.htm

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

Questions and Answers on Preparation of the *Cultural Resources Survey Report*[1]

Careful preparation and professional review of the *Cultural Resources Survey Report* is essential to effectively conduct the Section 106 review process.

What is the purpose of the Cultural Resources Survey Report?

The purpose of the *Cultural Resources Survey Report* is to (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.

Based on the *Cultural Resources Survey Report* and following the National Historic Preservation Act and implementing regulations and guidance, WSDOT contacts the State Historic Preservation Officer (SHPO) regarding the identification of historic properties and makes a determination of eligibility for listing on the National Register of Historic Places for SHPO's concurrence. WSDOT also contacts SHPO with their determination of the undertaking's effect on historic properties, if any.

The *Cultural Resources Survey Report* is keyed to the Area of Potential Effects (see Exhibit C). **The scope of work 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.

Who prepares 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[2] must take responsibility for the preparation of the *Cultural Resources Survey Report.* The work 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

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[2] 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.*

qualified consultant[3] engaged by WSDOT whose report is submitted to a WSDOT Cultural Resources Specialist.

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 Report.* 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.

What special considerations 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. Exceptions to this requirement may be appropriate in special cases, but this requires documentation of the circumstances, approval by the Director of WSDOT's Environmental Services Office, and concurrence from SHPO, all in writing and completed before the work begins.
- 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, the determination of effect on a historic property, and the determination of no adverse effect 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 Report* must include recommendations as to those determinations for each historic property and provide the basis of professional judgment for such recommendations.

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[3] Consultants are qualified by meeting the Professional Qualifications Standards of the Secretary of the Interior. The Professional Qualifications Standards contain minimum levels of qualifications based on work experience and education and can be found at: http://www.cr.nps.gov/local-law/arch_stnds_9.htm. The Department of Archaeology and Historic Preservation maintains on its web site a list of consultants who meet the Secretary's Professional Qualifications Standards. http://www.dahp.wa.gov/pages/EnvironmentalReview/Consultants.htm. The list is not an exhaustive list of qualified consultants, and does not endorse individual consultants. WSDOT also has on-call agreements for consulting services in cultural resources that can be used to identify and make task order assignments to qualified consultants.

- Responsibility for consultation with Tribes in matters of the Section 106 review process is a government-to-government function that is non-delegable by WSDOT to an consultant. The WSDOT staff person responsible for Tribal consultation in the preparation of the Cultural Resources Survey Report must be specifically identified to the other involved WSDOT staff and to any consultant that may be performing tasks on the *Cultural Resources Survey Report.* A consultant may contact a Tribe on behalf of WSDOT in the preparation of a *Survey*, after proper introduction of the consultant to the Tribe has been made by WSDOT.

When is the Cultural Resources Survey Report conducted?

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 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 the MOA's preparation 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.

What does the Section 106 review require as to the effort made in the Cultural Resources Survey Report to identify historic properties?

A reasonable and good faith effort 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. 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 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[4]. For more information on this topic, consult the guidance prepared by the federal Advisory Council on

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

Historic Preservation, *Consulting with Indian Tribes in the Section 106 Review Process* (updated August 22, 2005).

Known and potential Traditional Cultural Properties should be examined in the *Cultural Resources Survey Report.* Communications with Tribes as consulting parties should request information on Traditional Cultural Properties. Gathering information about Traditional Cultural Properties will involve government-to-government consultation with affected, recognized Tribes that must be carried out directly as the responsibility of WSDOT (with FHWA and SHPO, as appropriate), even if the preparation of the *Cultural Resources Survey Report* has been assigned to an outside consultant. For the Section 106 review process to succeed, Tribes are also responsible for providing information about Traditional Cultural Properties in the project vicinity. 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 and its staff and consultants, SHPO 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 religious site by practitioners. Generally this will require that the responsibility for safeguarding confidential information must be directly undertaken by WSDOT and SHPO as state participants in government-to-government relationships 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 detailed 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 DAHP 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 Report.* WSDOT will work with DAHP to coordinate the results of the geomorphological assessment with the scope of work for the *Survey.* On smaller projects, WSDOT will consider the need for, and perform, a geomorphological assessment as necessary based upon the nature of the project.

What are the 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 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 upon which the *Cultural Resources Survey Report* will be based, including an estimate of the level of effort and the budget to be assigned to each task.
- A plan for coordinating with consulting parties on the preparation of the *Cultural Resources Survey Report.* This will include 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 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.

What is required in 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 Report* 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.

- The *Cultural Resources Survey Report* needs to identify all historic properties within the Area of Potential Effects, established by WSDOT and concurred upon by the SHPO as well as by Tribes when there are historic properties with religious and cultural significance to Tribes. Information should be gathered from any relevant Tribe to assist in identifying land, whether or not located on tribal lands that may be of religious or cultural significance to the Tribe.

What needs to be included in a Cultural Resources Survey Report Report?

The *Cultural Resources Survey Report* 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, and adhere to the DAHP's Survey and Inventory Standards, found at:

http://www.dahp.wa.gov/pages/Documents/documents/ExternalFinalFINAL_000.pdf

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 at least the following:

- A cover sheet in the form supplied by the Department of Archaeology and Historic Preservation.

- 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 Report, 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 including the title of the Cultural Resources Survey Report.

- 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.

- Methods of survey and testing of the Area of Potential Effects that shows the work was adequate to locate, identify, and assess any historic properties in 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 and the *Survey and Inventory Standards* of the Department of Archaeology and Historic Preservation. 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 reevaluation of properties previously determined eligible or ineligible and shall acknowledge the special expertise Indian 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, contents of subsurface testing, exposed features or soils, local resource acquisition sites, 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.

- Professional recommendations of the preparers of a Cultural Resources Survey Report, including the judgments of consultants if any, must reference the regulations or guidance to which their recommendations relate (for example, for determinations of eligibility for listing on the National Register of Historic Places reference must be made to the Criteria for Evaluation (a-d) and the seven "aspects of integrity").

- 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 or other authorized employee, even when reliance has been placed on the professional judgment of a consultant included in the Cultural Resources Survey Report.

- Archaeological Site/Historic Property Inventory Forms or 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 all identified historic buildings and structures. [5]

- Resumes of the Principal Investigator and of any other individuals conducting or supervising the work of the survey must be included in an appendix.

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

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

How can I ensure that the preparation of the Cultural Resource Survey results in the most effective consideration of cultural resources and is in 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 Report* before it is prepared. Many of the case-by-case issues presented in the preparation of a *Cultural Resources Survey Report* may profitably be guided by *early and, if necessary, 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

[5] The formats 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 and found in its Survey and Inventory Standards.

Section 106 review process; and ultimately, to the timely and cost-effective delivery of transportation projects.