Appendix H: Tribal Agreements

- Programmatic Agreement between FHWA, WSDOT and the Confederated Tribes of the Umatilla Indian Reservation
- Memorandum of Agreement between FHWA, WSDOT NW Region and the Lummi Nation on natural resources consultation

PROGRAMMATIC MEMORANDUM OF AGREEMENT

Among the

FEDERAL HIGHWAY ADMINSTRATION WASHINGTON DIVISION,

THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, SOUTH CENTRAL REGION

and

THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

for

COORDINATION and CONSULTATION ON STATE TRANSPORTATION ACTIVITIES

WHEREAS, the Federal Highway Administration Washington Division (FHWA) and the Washington State Department of Transportation, South Central Region (WSDOT SCR) recognize that the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) considers its cultural heritage and customary use locations as invaluable and critical to the preservation of its treaty rights, cultural heritage, natural resource interests, and pursuit of traditional life ways for present and future generations; and

WHEREAS, the CTUIR is a sovereign government having an interest in the preservation and protection of its treaty rights and cultural heritage both within the boundaries of the Umatilla Indian Reservation and within the CTUIR's lands ceded by the Treaty of 1855, 12 Stat. 945 (see Appendix A – Ceded Lands of the Confederated Tribes of the Umatilla Indian Reservation [hereinafter "CTUIR ceded lands"]); and

WHEREAS, the FHWA, as an agency of the United States government, acknowledges its trust obligations to the CTUIR and that it is the intention of the FHWA to use this Agreement as a means to carry out its trust obligations to the CTUIR; and

WHEREAS, the FHWA through the WSDOT SCR, is responsible for compliance with federal and state laws and regulations to address impacts to natural and cultural resources that all parties have collective interests in protecting. Under this agreement special attention will be given to the FHWA and the WSDOT responsibility under Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 et seq.); and

WHEREAS, the FHWA and the WSDOT SCR recognize that certain undertakings take place within the CTUIR ceded lands, and may have an effect upon historic properties included in or

eligible for inclusion in the National Register of Historic Places, and properties that contain Native American burials that require compliance with the Native American Graves Protection and Repatriation Act ("NAGPRA," 25 U.S.C. 3001 et seq.) and its regulations (43 CFR Part 10); and

WHEREAS, the WSDOT may enter into intergovernmental agreements pursuant to RCW 39.34, RCW 47.04.070, and WSDOT Centennial Accord Plan, 2003; and

WHEREAS, On December 9, 2004, the State of Washington and the Confederated Tribes of the Umatilla Indian Reservation signed an Accord recognizing and respecting each others sovereignty, as well as acknowledging the government-to-government relationship, in order to address issues of mutual concern; and

WHEREAS, the Board of Trustees has the authority to negotiate and enter into agreements with state and federal government agencies to protect CTUIR Treaty and statutory rights and Tribal resources pursuant to Article VI, §1 of the CTUIR Constitution; and

WHEREAS, respectful of each other's legitimate values and goals, the FHWA, the WSDOT SCR, and the CTUIR agree to establish and maintain a relationship based on open dialog, mutual respect, and early coordination. The overall purpose of this agreement is to create a consultation process that allows for the opportunity for tribal input on actions by the FHWA and WSDOT SCR (hereinafter "lead agencies") and to cooperatively work together to implement the National Historic Preservation Act (NHPA) and other issues of mutual concern. The goal of this dialog is to allow the lead agencies to use this input to identify impacts to the social, cultural, natural, and economic environments and seek opportunities to avoid and minimize those impacts, or to preserve or enhance the resource when possible prior to undertaking an action; and

WHEREAS, the process outlined in this agreement will facilitate communication between the parties for the purpose of consulting on actions, which may affect the aforementioned resources and other interests of all parties; (WSDOT Consultation Executive Order E1025.00, 2/19/03);

NOW THEREFORE, the FHWA, the WSDOT SCR, and the CTUIR do hereby agree to the following consultation process for federal-aid highway transportation projects in Washington State, and the following coordination of non-federal activities so that the WSDOT program can be presented and understood by all parties in its entirety:

1. **Consultation under Sec. 106 of the NHPA of 1966**

   a. The FHWA has a responsibility to ensure Government-to-Government consultation occurs as per 36 CFR 800.

   b. Pursuant to 36 CFR 800.2 (c)(4) and the process outlined in the letter of May 4, 2001 from FHWA to WSDOT the FHWA has delegated the formal initiation-of-consultation under the NHPA on individual projects to WSDOT.

c. Consultation includes the direct participation of the parties in all phases of an undertaking that has the potential to affect historic properties and cultural resources protected by treaty and applicable statutes. Consultation shall be initiated at the earliest stage possible and should continue from the planning stage, through scoping, design, construction, operation and into maintenance as is appropriate based on the context and the intensity of the activity.

2. Coordination of activities

a. Recognizing the roles and responsibilities of each party, the parties will discuss current and future programs, projects, and other activities as early as possible and as often as necessary to maintain the spirit and intent of this agreement.

b. In discussing the WSDOT SCR program, an opportunity may arise to identify and address unknown impacts and/or potential partnering opportunities to more effectively manage cultural, economic, natural and other resources more effectively.

3. Points of Contact

a. The point of contact for each party shall serve as the central resource under this agreement with the responsibility for internal coordination of activities performed under this programmatic agreement.

b. The Environmental Program Manager, or a person designated by the FHWA Division Administrator, will be the FHWA responsible official for the purpose of consulting with the WSDOT and the CTUIR.

c. WSDOT SCR Tribal Coordinator, SCR Environmental Manager, or someone designated by the WSDOT SCR Administrator shall be the responsible official for the purpose of consulting and coordination with the CTUIR.

d. The Chair of the Board of Trustees or someone designated by the Chair of the Board of Trustees shall be the responsible Tribal government official for the purpose of consulting and coordination. Further, all written communications must also be directed to the Chair of the Cultural Resources Committee and the Program Manager of the Cultural Resources Protection Program.

e. Either the CTUIR or the WSDOT SCR staff may contact the WSDOT Tribal Liaison Office - HQ - for inclusion in communications as necessary.

f. Each Party shall notify the other parties in writing when the point of contact changes. Such changes shall not require amendment of this agreement.

4. **Location of the undertaking:**

This agreement shall cover all applicable undertakings within the CTUIR ceded lands in the State of Washington that potentially affect historic and/or traditional cultural properties.

5. **The FHWA and WSDOT areas of joint responsibility:**

The overall purpose of this agreement is to create a consultation process that allows for the opportunity for tribal input on actions by the lead agencies and to cooperatively work together to implement the NHPA and other issues of mutual concern.

a. The FHWA and the WSDOT SCR agree to invite the CTUIR to attend biannual program and periodic project specific meetings to discuss issues of concern to all parties as well as proposals for future projects. The WSDOT SCR will provide an opportunity for the CTUIR to review project definitions and environmental summaries early in the project-scoping phase. Tribal guidance and concerns will be noted and become part of the undertaking file of record with copies being forwarded to the appropriate points of contact as identified in the agreement. The WSDOT SCR will notify the CTUIR Tribal Employment Rights Office (TERO) as federal-aid highway projects are being planned.

b. To ensure the CTUIR's participation in all phases of an undertaking, (scoping, design, construction, operation and maintenance, as appropriate) as well as an opportunity for the CTUIR to provide input on non-federal activities, the WSDOT SCR shall consult with the CTUIR at the earliest possible point in the planning process. For individual projects that require a Section 106 review, the WSDOT SCR commits to continuing consultation through project development and construction phases. The FHWA, the WSDOT SCR, or the CTUIR may request a consultation meeting at any, or multiple points within the development of any project or program.

c. The WSDOT SCR shall provide the CTUIR with written notification to include: a description of the proposed project or program, the location of the project or program elements, a copy of the cultural resources work (survey, inventory, review and/or study); and the names of state and/or consultant contacts. If other concerns were discussed during the consultation and coordination of specific project or programs, then these issues may be the subject of consequent communication.

d. The FHWA and the WSDOT commit to an open communication process that maintains the spirit of this agreement and that of Government-to-Government consultation. Therefore communication, coordination, and education through information sharing will be key in implementing this programmatic agreement. Since the WSDOT SCR is the transportation project proponent, the WSDOT SCR responsible official will be lead in this process and will ensure that it is effectively

occurring. WSDOT SCR will establish and implement direct communication with the CTUIR TERO.

c. The FHWA and the WSDOT SCR will respect the need for discretion with regard to sensitive cultural and/or traditional resources. Information regarding historic properties and/or traditional and cultural resources shall be protected from release under applicable laws.

6. **The CTUIR Responsibility:**

a. The CTUIR commits to participating in project review meetings and sharing information, questions, and concerns about the WSDOT SCR project actions so that the WSDOT can adequately prepare to address these concerns in a proactive manner. Within 30 days of receipt of written notice (as defined in 5 (c) of this agreement), the CTUIR shall advise the WSDOT SCR of any concerns they may have with the project. The notification will document the existence or reasonable expectation of cultural resources at the proposed development site. If the CTUIR determines it has no concerns with the project, program, or types of activities, it will notify the FHWA and/or the WSDOT in writing. If the CTUIR chooses not to notify the FHWA or the WSDOT SCR, the WSDOT SCR will proceed with the project after 30 days.

7. **All Parties Joint Responsibility:**

a. This agreement is expected to be dynamic and capable of evolving along with the relationship it is intended to build. The agreement is expected to provide the framework for partnership opportunities between the parties during the current program development and into the future.

b. In the event that the CTUIR notifies the FHWA and/or the WSDOT SCR that they have concerns with any proposed project, the CTUIR may either address the concern with WSDOT SCR or request that the parties convene a project work group consisting of a representative from the FHWA, the WSDOT SCR, and the CTUIR to address identified concerns. All parties will endeavor to conduct the first meeting of the project work group within 30 calendar days, or as soon as possible in order to complete a preliminary assessment of the cultural or other identified resource and address the concerns.

c. The FHWA, the WSDOT and the CTUIR will attempt to work in harmony to identify and resolve issues. Should any party or assigned participant encounter difficulties in so doing, the project work group will be so advised and afforded an opportunity to seek a remedy. The WSDOT HQ Tribal Liaison Office is available to facilitate communications if necessary.

d. The CTUIR may wish to provide an opportunity for WSDOT operational staff to participate in cultural resources sensitivity training. In turn WSDOT staff working in the field during their normal course of duty will attempt to identify cultural resources if inadvertently discovered, and aid in the protection of cultural resources if they observe individuals or activities that would lead to the destruction or desecration of potential cultural resource locations.

8. **Inadvertent Discoveries**

a. **Discovery of Human Remains.**
In the event that human remains are inadvertently discovered, the CTUIR Policies and Procedures Manual for the Handling of Ancestral Human Remains will be implemented. (See Attached – Appendix B) This means that excavations will be stopped immediately in the area of the discovery, the discovery will be secured, and consultation between the WSDOT SCR, the CTUIR, the Washington Office of Archaeology and Historic Preservation / Washington State Historic Preservation Officer, the FHWA, the Army Corps of Engineers (if on Corps land or permitted by the Corps) will begin immediately. Notification of Washington State Police and appropriate medical examiner (or coroners office) will be implemented as required by law.

b. **Discovery of an Archaeological Site:**

In the event that a previously unidentified archaeological site is inadvertently discovered, the WSDOT SCR Standard Specification for Archeological Cultural Inadvertent Discovery will be implemented. (See Attached – Appendix C) This means that excavations will be stopped immediately in the area of the discovery, the discovery will be secured, and consultation between the WSDOT SCR, the FHWA, the CTUIR, the Washington Office of Archaeology and Historic Preservation / Washington State Historic Preservation Officer, and the Army Corps of Engineers (if on Corps land or permitted by the Corps) will begin immediately. If a consultation results in a determination that a site has been encountered; a preservation or mitigation plan will be drawn up as soon as possible. This plan will be sent for concurrence to the Washington State Historic Preservation Officer.

9. **Period of Performance:**

The conditions of this Programmatic Agreement shall be in place until amended or terminated by agreement of any of the signatory parties.

10. **Terms and Conditions:**

a. Nothing in this Programmatic Agreement limits, waives, or expands the sovereign immunity, jurisdiction, regulatory authority, or any other right or responsibility of any party.

b. If a signatory of the agreement determines that the terms of the agreement cannot be met, or that a change is necessary to meet the requirements of the law, that signatory will request that the consulting parties consider an amendment or addendum. The amendment or addendum will address changes or modifications so that the terms of the agreement and the requirements of the law can be met.

c. Amendments, supplements, or revisions to this Programmatic Agreement may be proposed and shall become effective upon formal approval of all parties to this agreement.

d. Any signatory to this agreement may suspend it by providing written notification to the other parties. Consultation will occur to resolve issues for re-implementation of the agreement upon the written notification.

e. Nothing in this Programmatic Agreement is intended, nor shall be construed, to limit, restrict, or otherwise impair any right reserved by the CTUIR pursuant to its Treaty of 1855, or any right of the CTUIR pursuant to applicable federal or state law.

11. Other Agreements not precluded:

The intent of this Programmatic Agreement is to act as an umbrella agreement defining how the FHWA, the WSDOT SCR, and the CTUIR will coordinate, communicate and consult on a wide range of issues stemming from the various planning, design, construction, and maintenance activities contained within WSDOT SCR operations and programs.

It is not intended that this agreement be contingent on other agreements, however, if it is determined that it is desirable to develop agreements to address specific areas of interest, this Programmatic Agreement is not intended to preclude such agreements.

12. Dispute resolution:

Should any party to this Programmatic Agreement object within 30 days to any documentation submitted or actions proposed pursuant to this PA, FHWA will ensure that the WSDOT SCR consults with the objecting party to resolve the objection. If the objection cannot be resolved, the FHWA will at the very least comply with 36 CFR 800.4 through 36 CFR 800.6, in order to meet its Section 106 responsibilities for the undertaking. The FHWA and the WSDOT SCR's responsibility to comply with the stipulations of this PA for all other projects that are not subject to the dispute will remain unchanged.

When requested by any interested person, the Advisory Council on Historic Preservation will review any findings or determinations under this PA. The provisions of 36 CFR 800 on Public Requests to the Council will apply.

Execution and implementation of this PA is in furtherance of the FHWA Section 106 responsibilities for the WSDOT SCR undertakings involving the CTUIR ceded lands within Washington State.

Federal Highway Administration Washington Division

Daniel M. Mathis — 03/08/05

Daniel M. Mathis
Division Administrator

Date

Washington State Department of Transportation

Don Whitehouse — 3/10/05

Don Whitehouse, P.E.
South Central Region Administrator

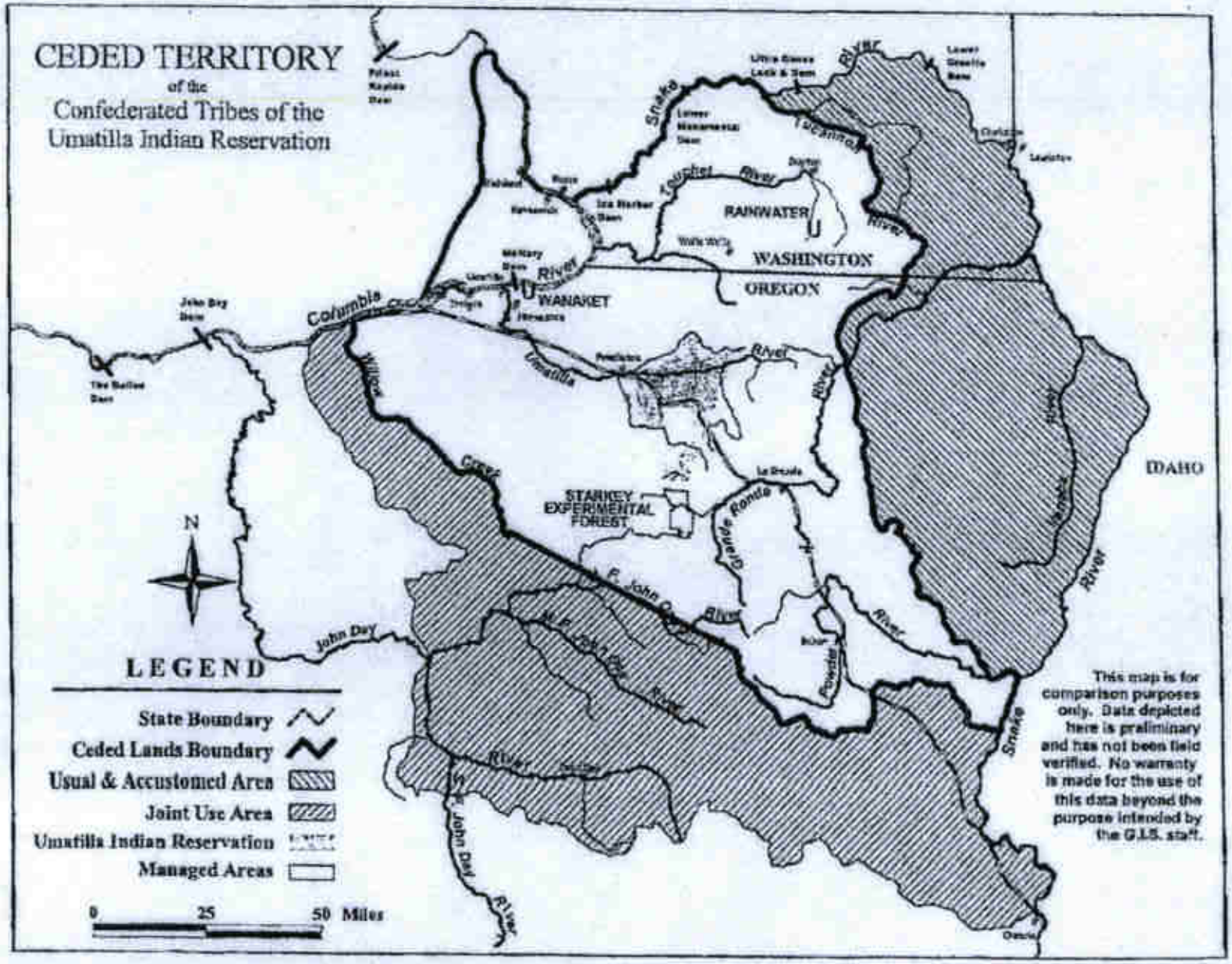
Date

Confederated Tribes of the Umatilla Indian Reservation

Antone C. Minthorn — 3/10/05

Antone C. Minthorn,
Chairman, Board of Trustees

Date



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THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

POLICY AND PROCEDURE MANUAL

FOR

THE REPATRIATION OF ANCESTRAL HUMAN REMAINS AND FUNERARY OBJECTS

May 19, 1993
(revised July 6, 1994)
(revised September 14, 2004)

Appendix B

INTRODUCTION

On November 16, 1990, President George Bush signed into law P.L. 101-601, the *Native American Graves Protection and Repatriation Act* (NAGPRA).

The NAGPRA requires all Federal agencies, all Museums which receive Federal funding and Universities to conduct summaries and inventories for the purpose of identifying all Native American human remains, associated and unassociated funerary objects, sacred objects and objects of cultural patrimony, for the ultimate purpose of returning such remains and objects to Indian Tribes for repatriation.

The NAGPRA also requires that these summaries and inventories be conducted in consultation with Indian Tribes. The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) have conducted previous repatriation activities. Since the passage of the NAGPRA, the CTUIR have developed an understanding that the NAGPRA has the potential to create a multitude of social, financial, legal and administrative threats to the CTUIR.

The historical fact that the CTUIR have never had a tradition of un-earthing ancestral human remains, and due to the social, legal and political chronicles surrounding the passage of the NAGPRA, have both compelled the CTUIR to develop fundamental policies and procedures to guide the Board of Trustees in the decision-making process regarding the NAGPRA and repatriation activities. In response to the NAGPRA and the potential threats to the CTUIR, the following policies have been adopted by the Board of Trustees for use in the decision-making process for the NAGPRA and all repatriation activities involving the CTUIR.

1. TRIBAL POLICY - AMERICAN INDIAN RELIGIOUS FREEDOM ACT

On August 11, 1978, the Congress of the United States enacted **Public Law 95-41 (92 Stat. 469)**, known as the **"American Indian Religious Freedom Act"**, which provides "on or after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites." It is the policy of the CTUIR to support this act.

2. TRIBAL POLICY - ACCESS TO SACRED SITES

The Board of Trustees shall take such actions as it deems necessary to ensure that Tribal members are granted access to sacred sites.

Appendix B

3. TRIBAL POLICY - PROTECTION OF INDIAN GRAVES

Oregon Revised Statutes 97.740 through 97.760 provide for the protection of Indian graves. It is the policy of the CTUIR to support enforcement of this statute. ORS 97.750 provides:

(a) If such action is necessary to protect the burial from imminent destruction, and upon prior notification to the State Historic Preservation Office and to the appropriate Indian tribe in the vicinity of the intended action, a professional archaeologist may excavate a Native Indian cairn or grave and remove resource objects and human remains for subsequent re-interment under the supervision of the Indian tribes.

(b) Except as provided in subsection (1) of this section, any proposed excavation by a professional archaeologist of a Native Indian cairn or grave shall be initiated only after prior written notification to the State Historic Preservation Office and with the prior written consent of the appropriate Indian tribe in the vicinity of the intended action. Failure of a tribe to respond to a request for permission within 30 days of its mailing shall be deemed consent. All resource objects and human remains removed during such an excavation shall, following scientific study, be re-interred at the archaeologist's expense under the supervision of the Indian tribe.

(c) In order to determine the appropriate Indian tribe under this section and ORS 97.745, a professional archaeologist or other person shall consult with the Commission on Indian Services which shall designate the appropriate tribe."

(d) It is the intent of this Policy and Procedure Manual to provide a mechanism for expeditiously determining whether or not written consent for an excavation shall be given pursuant to ORS 97.750(2).

4. PROCEDURES FOR OBTAINING CONSENT

A request for consent to excavate pursuant to ORS 97.750 shall be presented to the Cultural Resources Protection Program (CRPP) of the Department of Natural Resources (DNR) for the CTUIR. The CRPP shall direct and coordinate appropriate representatives, employees and, or professionals under contract of the CTUIR to conduct an investigation of the matter and make a formal written report to the CTUIR's Cultural Resources Commission within 20 days recommending whether or not to grant consent to the excavation, and if consent is granted, what if any conditions should be imposed on the excavation. Such conditions shall include the option of the CTUIR to perform the excavation in full or in part and any other survey or preliminary work in full or in part, under contract with the requesting party.

5. TRIBAL POLICY - NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

The Native American Graves Protection and Repatriation Act (NAGPRA) provides for the protection of Native American graves and for the return and repatriation of human remains, associated and unassociated funerary objects, sacred objects and objects of cultural patrimony. It is the policy of the CTUIR to support the enforcement, implementation and administration of the NAGPRA. Specific CTUIR policies regarding the NAGPRA are as follows:

(a) The Cultural Resources Commission of the CTUIR is vested with the authority to administer the provisions of the NAGPRA. The Cultural Resources Commission shall administer NAGPRA related issues using the NAGPRA and the regulations developed by the National Park Service as the planning instrument for the CTUIR on all NAGPRA related activities. The Cultural Resources Commission shall coordinate all repatriation activities with the Board of Trustees, the Office of General Council and the CRPP for the CTUIR.

(b) The CRPT shall assist the Cultural Resources Commission in developing administrative strategies regarding Tribal consultation with federal agencies and others, regarding the proper handling and disposition of human remains, associated and unassociated funerary objects, sacred objects and objects of cultural patrimony.

(c) The Cultural Resources Commission shall in consultation with the Board of Trustees, and the Tribal attorney, initiate administrative and or legal action to enforce the provisions of the NAGPRA.

(d) The Cultural Resources Commission with the assistance of the CRPP, shall identify Tribal and non-Tribal lands suitable for repatriation activities. Any lands so acquired shall be administered by the DNR.

(e) The Cultural Resources Commission is authorized and encouraged to negotiate memoranda of agreement with other tribes regarding protocol on repatriation activities. The Cultural Resources Commission is also authorized to negotiate memoranda of agreement with private landowners, local, state and federal agencies regarding the availability and suitability of setting-aside lands suitable for repatriation activities. The final authority to sign any such agreement rests with the Board of Trustees.

(f) It is a policy of the CTUIR to repatriate and reinter all human remains, associated and unassociated funerary objects which have been identified to have originated from ancestral burial sites within the CTUIR's ceded lands.

(g) It is a policy of the CTUIR to require all federal agencies, museums, universities and colleges, and or any other entity, public or private, to comply with the provisions of the NAGPRA. All human remains, sacred objects, associated and unassociated funerary objects and objects or cultural patrimony must be documented in a summary or in an inventory in conjunction with the repatriation of any such human remains or objects. The

CTUIR will not accept any human remains or objects for repatriation without documentation.

(h) It is a policy of the CTUIR to solicit full participation of the General Council in all NAGPRA related issues.

6. STANDARDS AND PROCEDURES FOR THE DISCOVERY AND HANDLING OF ANCESTRAL HUMAN REMAINS

(a) Applicability:

The procedures describe the necessary steps to be followed in the discovery and subsequent handling of ancestral human remains found within the CTUIR's ceded lands or lands within the possessory and usage area of the Cayuse, Walla Walla and Umatilla Tribes. The intent of these procedures is to ensure that such remains are treated with dignity at all times and, when applicable, are accorded appropriate handling as specified by a Tribal representative.

As a guiding principle, the CTUIR recognize and reaffirm the belief that Native American ancestral human remains hold paramount religious significance to many contemporary Sahaptin speaking peoples of the Columbia Plateau. To better protect and enhance our traditional cultural values, the CTUIR establish the following policies:

(1) All encountered human remains are to be treated as Native American until available evidence indicates otherwise.

(2) Preference shall be given to the preservation of ancestral human remains "in-situ" if feasible.

(3) The repatriation of ancestral remains will occur as expeditiously as possible and in the same location whence the remains came, if practical.

(4) In the event of an inadvertent discovery of ancestral human remains during the course of construction of a project developed by and on behalf of the CTUIR, its governmental departments, tribal corporations and tribal enterprises, projects constructed on CTUIR trust land, and CTUIR members within the boundaries of the Umatilla Indian Reservation; CTUIR Board of Trustees Resolution 04-071 shall apply.

Preservation in situ is not always feasible, therefore alternative protective measures must be implemented and carried out in a manner consistent with the recommendations of the CTUIR. Given the complexity of each potential discovery, ample opportunity must be given to the CTUIR to participate in or oversee any identification or removal procedure immediately thereafter from the time of discovery.

(b) Procedures regarding the Discovery of Human Remains

(1) All suspected in-situ human remains and or burials that have been exposed as a result of adverse impact or disturbance, must be reported immediately to the Cultural Resources Commission, the Board of Trustees, the Umatilla Tribal Police Department, the Oregon State Police and the appropriate Medical Examiners Office by the CRPP. If the discovery occurs on state or federal lands, a detailed letter or report from the agency with administrative jurisdiction over such lands shall be requested.

(2) In the event that suspected remains are endangered due to adverse impacts or other occurrences, then interim protective measures shall be developed and implemented.

(3) The Cultural Resources Commission and the Board of Trustees shall be notified by the CRPP regarding opportunities to inspect any burial site and ancestral human remains.

(4) Coordinated efforts to inspect burial sites and or ancestral human remains, should include members of the Board of Trustees, members of the Cultural Resources Commission, appropriate law enforcement personnel, land managers, archaeologist, and or anthropologist, and CTUIR cultural resources staff. The CRPP shall ensure that all law enforcement agencies with jurisdiction and the appropriate Medical Examiner are informed of any planned inspection of a burial site.

(5) Burial inspections shall determine if the skeletal remains are human, and if human, if the remains are modern or ancient. Burial inspection procedures shall be limited to non-destructive observational analysis by a qualified physical anthropologist. The inspection procedure will terminate if the remains are determined to be of modern origin, and possibly under the jurisdiction of a law enforcement agency. The inspection team shall also determine evidence of desecration or violations of applicable statutes such as the NAGPRA or the Archeological Resources Protection Act (ARPA). If there is evidence of NAGPRA or ARPA violations, the team shall thoroughly document the violation using the best available investigative techniques.

(6) If the discovery is determined not to be within the jurisdiction of law enforcement, then the inspection team shall determine, using the best available evidence, if the human remains are Native American or non-Native American in origin. The inspection procedure will terminate if the inspection team determines that the remains are non-Native American. If the inspection team determines that the remains are of Native American origin, the inspection team shall initiate interim measures to secure the site until a formal plan is developed by the Cultural Resources Commission and the CRPP.

(7) No parts of human remains, including associated (or unassociated) funerary objects or artifacts, shall be handled, removed, collected or photographed without direct supervision and approval of the CRPP or as otherwise authorized in writing by the Cultural Resources Commission or the Board of Trustees.

(8) If human remains and or burials are discovered in-situ during the course of any ground disturbing activity, the activity is to be halted until an on-site inspection is completed.

(9) If planned construction and or ground disturbing activities is such that destruction of the exposed remains is imminent, emergency removal and exhumation procedures shall be developed and implemented immediately.

(10) If ancestral human remains and or burials are discovered in-situ during the course of an archeological excavation, excavation activities shall cease and the Cultural Resources Commission shall be notified. Once the inspection team has concluded its inspection, and if conditions favor preservation in-situ, the Cultural Resources Commission shall develop a plan for reinterment. If conditions do not favor preservation in-situ, then the remains may be exhumed pursuant to a plan developed by the Cultural Resources Commission.

(c) Procedures for the Analysis of Human Remains.

(1) Once any human remains are determined to be Native American, in all cases, the CTUIR reserve the right to reburial without scientific study, however when deemed appropriate, the CTUIR will allow human remains to undergo limited non-destructive observational analysis by a qualified physical anthropologist.

(2) In all cases, the CTUIR reserve the right to the re-burial of associated funerary objects without scientific study.

(3) In all cases, prior permission for scientific study shall be obtained in writing from the Cultural Resources Commission or the Board of Trustees.

(4) No methods of study shall be employed that diminishes the integrity of the remains or associated funerary objects.

(5) A reasonable effort shall be made to retain all organic materials contained in, or on the surface of any human bone or associated funerary object for the purposes of reburial.

(d) Procedures for the Reinterment of Human Remains

(1) The CTUIR reserve the right to reburial of any ancestral remains and or funerary

objects without prior notification.

(2) The Cultural Resources Commission in conjunction with the CRPP shall upon notification that ancestral human remains have been discovered, develop the appropriate plan to reinter the human remains.

(3) The Cultural Resources Commission shall determine if there are any known relatives to the ancestral remains. If there are no known relatives, the Cultural Resources Commission shall promulgate a summary of the discovery, seeking participation of the General Council. The Cultural Resources Commission shall post the summary at the Tribal Office, the Longhouse, and the General Council Office. The summary shall include a brief description of the discovery and also invite members of the Board of Trustees, the General Council and traditional leaders from the community to meet with the Cultural Resources Commission in a worksession. The worksession shall focus on the details of the reinterment. A plan shall be drafted by the CRPP at the conclusion of the worksession.

(4) Whenever possible, reinterment shall occur at the original location of discovery. All information regarding the existence of known burials, should be safeguarded and not announced publicly.

(5) The CRPP shall provide the administrative support for Cultural Resources Commission activities.

7. DEFINITIONS

(1) "Adverse effect" means a reasonable likelihood of more than moderate adverse consequences for cultural resources in any given site or area, the determination of which is based on (1) the context of a proposed action or development; (2) the intensity of a proposed action, including the magnitude and duration of an impact and the likelihood of its occurrence; (3) the relationship between a proposed action and other similar actions which are individually insignificant but which may have a cumulatively significant impacts; and (4) proven mitigation measures which the proponent of an action will implement as part of the proposal to reduce otherwise significant effects to an insignificant level.

(2) "Ancestral burial site" or "Burial Site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which there was intentionally deposited, as part of the death rites or ceremonies of a culture, the remains of a deceased individual or individuals. All Ancestral burial sites shall also be considered sacred sites and be defined as a "Protected site".

(3) "Ancestral human remains" or "Human Remains" means the physical remains, articulated or unarticulated bones and bone fragments, artifacts, and the surrounding soil matrix where

decomposition has occurred of any deceased human remains that are reasonably believed to be of Native American, or any deceased human individual of historic or prehistoric origin that is known, or has been identified, through available evidence, as Native American.

(4) "Board of Trustees" means the Board of Trustees of the Confederated Tribes of the Umatilla Indian Reservation or their successors.

(5) "Ceded area" means that area ceded to the United States by the Umatilla, Cayuse and Walla Walla Tribes in the Treaty of June 9, 1855.

(6) "Consultation" unless used otherwise in this Manual, means the formal, direct face-to-face contact with the CTUIR by any governmental agency or private entity. Such contact or "consultation" is for the specific purpose of seeking Tribal participation as required by Federal or State Statutes.

(7) "Cultural Resources Protection Program (CRPP)" means the program and staff of the Department of Natural Resources created to protect, preserve and enhance cultural resources important to the membership of the Confederated Tribes of the Umatilla Indian Reservation.

(8) "DNR" means the Department of Natural Resources for the Confederated Tribes of the Umatilla Indian Reservation.

(9) "Cultural Resources Studies" means actions conducted to determine if cultural resources are present in an area that would be affected by a proposed uses or development. Cultural Resources Studies may include but not limited to; archival research, surface surveys, subsurface testing, mitigation/data recovery and ethnographical/ethnohistoric research.

(10) "Cumulative Effects" means the combined effects of two or more activities. The effects may be related to the number of individual activities, or to the number of repeated activities on the same piece of ground. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.

(11) "Funerary objects" means any artifact or material -

(a) which was intentionally placed with a deceased individual, either at the time of burial or at some subsequent time thereafter, as part of the death rites or ceremonies of a culture, and

(b) which has been identified, through available evidence, as having been removed from a burial site.

(12) "General Council" means the entire membership of the Confederated Tribes of the Umatilla Indian Reservation over the age of 18 years, or as otherwise defined by the Confederated

Tribes Constitution and By-Laws.

(13) "Genetic descendent" means any person or persons known, or reliably assumed to have a relationship to a specified human individual or group of individuals.

(14) "Ground Disturbing Activity" means any activity that disturbs the surface of the ground, such as construction, digging, logging, farm practices on uncultivated soil, dredging, drilling, filling and mining.

(15) "Human remains" means the physical remains of any deceased human individual.

(16) "Indian" means, unless otherwise specified, a member of The Confederated Tribes of the Umatilla Indian Reservation, or any other person of Indian blood who is a member of a federally recognized Indian tribe or any other person on the Reservation who is recognized by the community as an Indian, including a Canadian Indian or an Alaska native.

(17) "In situ" means any undisturbed intact human remains or portions thereof, including burial sites, in their original depositional setting at the time of burial. In situ shall also mean the undisturbed intact artifacts which form a part of an archaeological site.

(18) "Lineal Descendant" means any person(s), that can demonstrate lineal and/or familial descendance of a person or human remains, or objects which are subject to the NAGPRA. A lineal descendant may use charts, records, archival materials, documented oral histories, documented ethnographic information, and any other documentation which aids in establishing descendance.

(19) "Mitigation" means the use of any or all of the following actions: (1) Avoiding the impact altogether; (2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation; (3) Rectifying the impact by repairing, rehabilitating, or restoring the affected cultural resources and or environment; or (4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(20) "Museum collections" means any private, local, state, or federal agency, including institutions of higher education which has control or possession of Tribal cultural resources.

(21) "Native American" has that same meaning given for "Indian".

(22) "Native American Graves Protection and Repatriation Act" or NAGPRA has the same meaning as that within P.L. 101-601 (25 U.S.C. 3001-3013)

(23) "Objects of Cultural Patrimony" means an object having ongoing historical, traditional, or cultural importance central to the Tribal people who currently comprise the Umatilla, Cayuse and Walla Walla cultures, rather than property owned by an individual Tribal member, and which therefore, cannot be alienated, appropriated, or conveyed by any

individual regardless of whether or not the individual is a member of the Umatilla, Cayuse, Walla Walla or any other tribe and such object shall have been considered inalienable by the Umatilla Cayuse or Walla Walla tribes at the time the object was separated from the Confederated Tribes.

(24) "Post-depositional disturbance" means any disturbance by natural or man-made processes that alters or degrades the integrity of a known or potential site.

(25) "Reburial" means the physical replacement of disinterred human remains and or funerary objects into the ground at its original location, or at other specified locations deemed appropriate by the Confederated Tribes.

(26) "Reinterment" means the ritual aspect of reburial that is conducted under strict cultural rules of practice by a traditional religious practitioner.

(27) "Repatriation" means the physical return of any cultural item or artifact, including human remains, to its place of origin.

(28) "Reservation" means all lands within the external boundaries of the Umatilla Indian Reservation of Oregon as defined by the Treaty of June 9, 1855.

(29) "Sacred Objects" means specific ceremonial objects which are needed by Tribal members for the practice of traditional Indian religions by present day adherents.

(30) "Undertaking" means any project, activity, program or development or change in land use that can result in changes in the character or use of a cultural resource, if any such cultural resource(s) is located in the area of potential effects. For federal undertakings, the project, activity or program must be under the direct or indirect jurisdiction of a federal agency or licensed or assisted by a federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements (36 CFR 800.2(a).

Appendix B

WSDOT SCR Standard Specification for Archeological Cultural Inadvertent Discovery

Protection And Restoration Of Property

Archaeological and Historical Objects

Section 1-07.16(4) is supplemented with the following:

(******)

It is national and state policy to preserve, for public use, historical and prehistorical objects such as ruins, sites, buildings, artifacts, fossils, or other objects of antiquity that may have significance from a historical or scientific standpoint.

The project area potentially contains cultural resources. All ground disturbing activities (excavation) will be monitored, and archaeological testing conducted, by the Contracting Agency's archaeologist consultant.

The Contractor shall notify the Engineer, in writing, at least fifteen days prior to the date the Contractor intends to begin ground disturbing operations so that the Contracting Agency can inform the consultant and interested Tribal Officials.

If the monitor encounters historic or prehistoric artifacts during ground disturbing activities, work will be stopped at that particular excavation site until consultation between the Contracting Agency, the Corps of Engineers, Walla Walla District (Corps) archaeological staff (if on US Army Corps of Engineers land), the State Historical Preservation Office (SHPO) and interested tribes has taken place. Procedures pursuant to compliance with the National Historic Preservation Act (16 U.S.C. 470f) and 36CFR800 will then be implemented. Should data recovery be stipulated as appropriate mitigation in a subsequent agreement concluded to address adverse effect to a National Register of Historic Places eligible property, application will be made to the Corps for an excavation permit if appropriate issued under provisions of the Archaeological Resources Protection Act (16 U.S.C. 470aa-11) and 32CFR229.

In the event that human remains are inadvertently discovered, procedures will be implemented pursuant to compliance with the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001-3013). This means that excavations will be stopped immediately in the area of the discovery, the discovery will be secured, and consultation among the Contracting Agency, the Washington State Historic Preservation Officer, the Corps (if on US Army Corps of Engineers land) and interested tribes will begin immediately.

The Contractor may be required to conduct ground disturbing activities in a manner that will reserve portions of the work area for testing and exploratory operations. Contract time lost, as determined by the Engineer, due to these operations will be adjusted in accordance with Section 1-08.8.

Added work necessary to uncover, fence, dewater, or otherwise protect or assist in salvage as ordered by the Engineer shall be paid by force account as provided in Section 1-09.6.

To provide a common basis for all bidders, the Contracting Agency has entered an amount for the item "Archaeological and Historical Salvage" in the Proposal to become a part of the total bid by the Contractor.

MEMORANDUM OF AGREEMENT

Among

THE FEDERAL HIGHWAY ADMINSTRATION
WASHINGTON DIVISION,

THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
NORTHWEST REGION,

and

THE LUMMI NATURAL RESOURCES DEPARTMENT

for

CONSULTATION ON STATE TRANSPORTATION ACTIVITIES THAT MAY AFFECT NATURAL RESOURCES

WHEREAS, the Federal Highway Administration Washington Division (FHWA) and the Washington State Department of Transportation Northwest Region (WSDOT NWR) recognize that the policy of the Lummi Nation (LN) is, as a highest priority, to protect and preserve natural resources that are part of their tradition and are required to sustain and enhance the quality of life of the Lummi People for present and future generations; and

WHEREAS, the Lummi Indian Business Council (LIBC) is the duly constituted governing body of the Lummi Indian Reservation by the authority of the Constitution and By-laws of the Lummi Nation of the Lummi Reservation, Washington; and

WHEREAS, the Lummi Nation is one of the signatories to the Point Elliot Treaty of January 22, 1855 (12 Stat. 927) which was ratified by the United States Senate on March 8, 1859, Proclaimed April 11, 1859 and which reserves certain rights for the Lummi people including but not limited to "the right of taking fish at usual and accustomed grounds and stations" and "hunting and gathering roots and berries on open and unclaimed lands"; and

WHEREAS, there have been decisions and subsequent court orders in numerous lawsuits including *United States v. Washington* (384 F. Supp. 312, 377 W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976)), that have interpreted this treaty; and

WHEREAS, the FHWA, as an agency of the United States government, acknowledges its trust obligations to the LN and that it is the intention of the FHWA to use this Memorandum of Agreement (MOA) for carrying out certain trust obligations to the LN; and

WHEREAS, the FHWA is responsible for compliance with federal and state laws and regulations to address impacts to natural resources that all parties have collective interests in protecting; and

WHEREAS, the WSDOT may enter into intergovernmental agreements pursuant to RCW 47.04.080, and WSDOT Centennial Accord Plan, 2003; and

WHEREAS, the consultation process outlined in this Memorandum of Agreement will facilitate communication between the parties on actions which may affect the aforementioned resources; (WSDOT Tribal Consultation Executive Order E1025.00, 2/19/03); and

WHEREAS, the Lummi Indian Business Council (LIBC) has the authority to negotiate with the Federal, State, and local governments on behalf of the LN pursuant to Article VI, §1(g) of the Lummi Constitution. The LIBC and Lummi Natural Resources Commission have authorized the Executive Director of Lummi Natural Resources to enter into agreements related to natural resources; and

WHEREAS, respectful of each other's values and goals, the FHWA, the WSDOT NWR, and the LN agree to establish and maintain a relationship based on open dialog, mutual respect, and early coordination; and

WHEREAS, the overall purpose of this MOA is to create a consultation process consistent with the United States' Official American Indian Policy (FR Vol. 59, No. 85, May 4, 1994), Consultation and Coordination with Indian Tribal Governments (Executive Order 13175 of November 6, 2000), Presidential Memorandum of September 23, 2004, and the Centennial Accord for cooperatively implementing various laws, policies, and regulations including the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), the Endangered Species Act (ESA), and addressing other issues of mutual concern; and

WHEREAS, the goal of the consultation process is to identify potential impacts to natural resources prior to undertaking an action and to enhance, preserve or minimize and avoid impacts to the resource to the greatest extent practicable; and

WHEREAS, consultation includes the direct participation of the parties during phases of an undertaking that have the potential to affect natural resources protected by treaty and applicable statutes with the goal of achieving informed decision-making; and

NOW THEREFORE, the FHWA, the WSDOT NWR, and the LN do hereby agree to the following consultation process for transportation projects that may affect natural resources in Washington State subject to other issues of mutual concern:

I. Lummi Nation Geographic Consultation Areas

A. WSDOT NWR shall initiate consultation with the LN on projects occurring within Whatcom, Skagit, Snohomish, Island, San Juan, and northern King Counties, Washington. LN will provide FHWA / WSDOT a digital map of these areas.

B. The LN reserves the right to refine the Consultation Areas at any time.

C. LN will notify WSDOT NWR of interest in undertakings outside of the designated Consultation Areas.

II. General Responsibilities During Consultation

A. The FHWA, the WSDOT NWR, and the LN support an open communication process that maintains Government-to-Government consultation and the spirit of this MOA.

B. The FHWA, the WSDOT NWR, and the LN will attempt to work in harmony to identify and resolve issues. Should any party encounter difficulties in so doing, the other participants will be so advised and afforded an opportunity to seek a remedy. The WSDOT Tribal Liaison Office – HQ is available to facilitate communications if necessary.

C. Communication, coordination, and education are critical to the implementation of this MOA. Since the WSDOT NWR is the transportation project proponent, the WSDOT NWR responsible official (see contact list in Appendix A) will be the lead in this process and will ensure that it is occurring effectively. The Lummi Natural Resources Department Executive Director or his designee will be the lead in this process on behalf of the LN.

D. FHWA, WSDOT and LN acknowledge that additional federal, state and / or tribal agencies involved in the project may have their own consultation requirements and processes. For example, the US Department of Fish and Wildlife have a consultation process to address impacts and issues under the Endangered Species Act (ESA).

E. The WSDOT NWR understands that although they are specifically funded to implement proposed transportation projects, the Lummi Natural Resources Department policy and technical staff are not specifically funded to work on these projects. In addition, the LN policy and technical staff have a substantial workload and other obligations that can make it difficult to provide timely review and comments on proposed WSDOT NWR actions. WSDOT NWR commits to working in good faith with the LN to address this issue.

F. Once consultation is formally initiated for a project, any tribal guidance and concerns will be noted and become part of the project file with copies being forwarded to the appropriate points of contact as identified in this MOA.

G. The Parties' relationship is dynamic and, as such, will evolve with time. This MOA is intended to provide the framework for partnership opportunities between the parties during the current program development and in the future.

H. For the purposes of this MOA, consultation means an effective process to allow elected officials or designated representatives of the LN to provide meaningful and timely input in the development of proposed transportation projects or regional policies on matters that substantially or uniquely affect their community.

III. WSDOT Consultation Responsibilities for Multi-project and Program Consultation

A. WSDOT NWR commits to meeting with the LN annually, or as needed, to review long-range planning documents, including the Highway System Plan, Route Development Plans and others WSDOT feels would be of interest to the LN. WSDOT NWR will also present the project list for the year / biennium for Lummi review.

B. The WSDOT NWR Assistant Regional Administrator for Maintenance will attend the annual meeting to discuss maintenance services and plans.

C. A goal of the Lummi Tribal Employment Rights Ordinance (TERO) is to create employment and training opportunities and to eradicate discrimination against Lummi tribal members and other Indians on or near the Lummi Reservation. An integral part of attaining this goal is to provide for the hiring of Indians who are qualified, and through training where there are no sufficiently qualified Indians, to meet the employment opportunities. To help achieve the goals of TERO, the LN TERO officer will be invited to annual meetings so they may be informed about upcoming projects.

IV. FHWA / WSDOT Consultation Responsibilities for Individual Projects

This section will describe the consultation process for WSDOT NWR capital improvement and preservation projects under review by the National Environmental Policy Act (NEPA) and State Environmental Policy Act (SEPA). As a federal agency, FHWA does not have any consultation or compliance responsibility for projects under SEPA only review. The specific consultation activities listed below represent the minimum consultation for each environmental classification. FHWA / WSDOT and LN may determine that some projects require more intensive consultation.

A. FHWA / WSDOT NWR will not initiate formal consultation for projects that do not affect natural resources including:

1. SEPA Determination of Non-Significance (DNS) (Although LN will receive a copy of the DNS and Environmental Checklist and have 14 days to comment).
2. SEPA Categorical Exemption
3. NEPA Categorical Exclusion
4. Endangered Species Act (ESA) No Effect Letter
5. Clean Water Act (CWA) Nationwide permit
6. State programmatic or general permits

B. WSDOT NWR will notify the LN on projects documenting mitigation measures to satisfy SEPA and NEPA including:

1. SEPA Mitigated Determination of Non-Significance (MDNS). The LN will receive a copy of the determination and Environmental Checklist and have 14 days to comment.
2. NEPA Documented Categorical Exclusion

C. The FHWA / WSDOT NWR will initiate formal consultation during public and agency scoping for projects requiring:

1. SEPA Environmental Impact Statement
   a) WSDOT NWR will initiate consultation via letter with the following information, if known:
      (1) WSDOT and / or consultant contact information.
      (2) Proposed location of the project, preferably in the form of a map if available;
      (3) General description of the proposed project activities, in particular any known ground-disturbing activities;
      (4) Copy of applicable environmental studies already completed prior to scoping, if applicable (e.g., wetland delineations, biological assessments); Draft studies must undergo internal WSDOT review before they can be circulated outside the agency.
      (5) Proposed deadline for LN response;
      (6) Any other information WSDOT NWR feels would be helpful in understanding the proposed project and its potential effects on natural resources;
   b) WSDOT NWR will send LN a copy of the Draft Environmental Impact Statement (DEIS) for review and comment.
   c) WSDOT NWR will send LN a copy of the Final Environmental Impact Statement (FEIS).

2. NEPA Environmental Assessment (EA)
   a) FHWA / WSDOT NWR will initiate formal consultation via letter with the following information, if known:
      (1) FHWA, WSDOT NWR and / or consultant contact information.
      (2) Proposed location of the project, preferably in the form of a map if available;
      (3) General description of the proposed project activities, in particular any known ground-disturbing activities;
      (4) Copy of applicable environmental studies already completed, if applicable (e.g., wetland delineations, biological assessments); Draft studies must undergo internal WSDOT review before they can be circulated outside the agency.
      (5) Proposed deadline for LN;

(6) Any other information WSDOT NWR feels would be helpful in understanding the proposed project and its potential effects on natural resources;

b) LN will be invited to agency scoping meetings, (if held).

c) WSDOT NWR will send LN a copy of the Environmental Assessment. LN will have a minimum of 30 days to comment.

d) WSDOT NWR will send the LN a copy of the Finding of No Significant Impact (FONSI).

3. NEPA Environmental Impact Statement

a) Under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), for NEPA EIS projects initiated after August 2005, tribes will be invited to be a participating agency. As a Participating Agency, Lummi Nation will be invited to comment on the project's Purpose and Need, Criteria for Alternatives Selection, the Range of Alternatives, and methods for analysis for the project.

b) The FHWA / WSDOT NWR will initiate formal consultation with the LN via letter, including the following information, if known:

(1) FHWA / WSDOT NWR and / or consultant contact information.

(2) Proposed location of the project, preferably in the form of a map if available;

(3) General description of the proposed project activities, in particular any known ground-disturbing activities;

(4) Copy of applicable environmental studies already completed, if applicable (e.g., wetland delineations, biological assessments); Draft studies must undergo internal WSDOT review before they can be circulated outside the agency.

(5) Proposed deadline for LN response;

(6) Any other information WSDOT NWR feels would be helpful in understanding the proposed project and its potential effects on natural resources;

c) WSDOT NWR will invite the LN to agency scoping meetings.

d) When the LN indicates an interest in a project, a consultation plan, including estimated timelines and frequency of regular meetings may be established. The consultation will incorporate processes for ongoing communications between the parties that will be established by mutual agreement whenever possible.

e) WSDOT NWR will send the LN a list of environmental discipline reports to be prepared for the project to determine if the LN is interested in participating in the development of any environmental discipline report.

f) WSDOT NWR will send Draft Environmental Impact Statements (DEIS) to the LN for review and comment.

g) WSDOT NWR will send the Preliminary Final Environmental Impact Statements (PFEIS) to LN for review and comment.
h) WSDOT NWR will send Final Environmental Impact Statements to the LN.
i) FHWA / WSDOT will notify the LN that the Record of Decision (ROD) is available.

V. Lummi Nation Consultation Responsibilities for Individual Projects

A. For projects documenting mitigation measures to satisfy SEPA and NEPA including:
1. SEPA Mitigated Determination of Non-Significance (MDNS). LN will provide comments to WSDOT NWR within 14 days.
2. NEPA Document Categorical Exclusion. LN will provide any comments to WSDOT NWR.

B. For projects that FHWA / WSDOT NWR initiates formal consultation on:
1. SEPA Environmental Impact Statement
a) Contingent on available resources, the LN will respond to the letter initiating consultation to indicate their level of interest in the project.
(1) If the LN indicates an interest in a project, they will notify WSDOT NWR of any desire to establish regular project meetings.
(2) The LN will identify, as early as practicable, any issues of concern regarding the project's potential natural resources impacts. Issues of concern include any issues that could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project.
b) Contingent on available resources, the LN will provide WSDOT NWR any formal comments they have on the Draft Environmental Impact Statement (DEIS).
(1) The LN's response will include whether or not additional natural resource assessments are recommended.
(2) If the LN determines it has no concerns, they will notify WSDOT NWR in writing.
(3) LN will provide any comments by the specified deadline, or contact the WSDOT NWR to discuss when the comments shall be submitted.
c) Contingent on available resources, the LN will provide WSDOT NWR any formal comments they have on the Final Environmental Impact Statement (FEIS). If the LN determines it has no concerns, they will notify WSDOT NWR in writing.

2. NEPA Environmental Assessment (EA)
    a) Contingent on available resources, the LN will respond to the letter initiating consultation to indicate their level of interest in the project.
        (1) The LN will identify, as early as practicable, any issues of concern regarding the project's potential natural resources impacts. Issues of concern include any issues that could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project.
    b) Contingent on available resources, the LN will provide WSDOT NWR any formal comments they have on the Environmental Assessment (EA).
        (1) The LN's response will include whether or not additional natural resource assessments are recommended.
        (2) If the LN determines it has no concerns, they will notify WSDOT NWR in writing.
        (3) LN will provide any comments by the specified deadline, or contact the WSDOT NWR to discuss when the comments shall be submitted.
3. NEPA Environmental Impact Statement (EIS)
    a) Contingent on available resources, the LN will respond to the letter initiating consultation to indicate their level of interest in the project; including whether they desire to be a Participating Agency under SAFETEA-LU.
        (1) If the LN indicates an interest in a project, they will notify WSDOT NWR of any desire to establish regular project meetings.
        (2) The LN will identify, as early as practicable, any issues of concern regarding the project's potential or natural resources impacts. Issues of concern include any issues that could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project.
    b) Contingent on available resources, the LN will notify WSDOT NWR if they are interested in participating in the development of any environmental discipline report.
    c) Contingent on available resources, the LN will provide WSDOT NWR any formal comments they have on the Draft Environmental Impact Statement (DEIS).
        (1) The LN's response will include whether or not additional natural resource assessments are recommended.
        (2) If the LN determines it has no concerns, they will notify WSDOT NWR in writing.
        (3) LN will provide any comments by the specified deadline, or contact the WSDOT NWR to discuss when the comments shall be submitted.

d) Contingent on available resources, the LN will provide WSDOT NWR with any comments they have on the Preliminary Final Environmental Impact Statement.

VI. Project Specific Issue Resolution Process

A. Execution and implementation of this MOA is in furtherance of the FHWA's government-to-government relations with Native American tribal governments for WSDOT NWR projects within the LN's geographic consultation areas within Washington State.

B. The parties will attempt to first resolve any project specific disagreement at the lowest level of the organization through consensus. The parties will abide by the resolution process of the applicable regulations.

C. If the parties are unable to resolve a disagreement, they can elevate the issue to decision makers as appropriate. Upon agreement by parties, an alternative issue resolution processes (e.g., facilitation or mediation) can be used.

D. Once the parties decide an agreement cannot be reached, they will have 30 days to provide a written explanation, describing their position and why they believe an agreement could not be achieved. These letters will be included in the project file.

E. If a disagreement cannot be resolved, the parties reserve their rights to all remedies provided by any applicable Treaty, regulation or statute.

VII. Points of Contact for Consultation and Other Issues of Mutual Concern Related to Natural Resources

A. The point of contact for each party shall be responsible for coordination within their respective entity of activities performed pursuant to the MOA.

B. The FHWA Environmental Program Manager or a person designated by the FHWA Division Administrator will be the FHWA responsible official for the purpose of consulting with the WSDOT and the LN.

C. The WSDOT NWR Environmental Manager and Local Programs Manager, or a person designated by the WSDOT NWR Administrator shall be the responsible official for the purpose of consulting and coordination with the LN. See Appendix A for contact names.

D. The Lummi Nation Natural Resources Department Executive Director shall be the responsible Tribal government official for the purpose of consultation and coordination with respect to natural resources. A copy of the letter initiating project-specific consultation should be addressed to the Chair of the Lummi Indian Business Council and copied to the Lummi Natural Resources Department Executive Director and the Environmental Program Director. Subsequent correspondence after initiating tribal consultation letter should be submitted to LN Natural Resources Department Executive Director and Environmental Program Director. See Appendix B for contact names. The LN Natural Resources Department Executive Director and Environmental Program Director shall be

responsible for coordinating with LN council and elevating issues for decisions as necessary.

E. Either the LN or the WSDOT NWR staff may contact the WSDOT Tribal Liaison Office – HQ for inclusion in communications as necessary.

F. Each party shall notify the other parties in writing when the point of contact changes. Such changes shall not require amendment of this MOA.

G. WSDOT NWR agrees to provide the LN the opportunity to negotiate a Master Services Agreement with WSDOT, which would make the LN eligible for contracts to prepare the environmental Discipline Reports, perform mitigation work etc (provided the staff member meet applicable standards) and/or construction monitoring for WSDOT or Local Agency projects subject to this agreement that is located within the Consultation Areas of the Lummi Nation.

H. The FHWA, the WSDOT NWR Local Programs Manager or Environmental Programs Manager, or the LN may request a consultation meeting at any point during review of a proposed project. All parties will endeavor to conduct the meeting within 30 calendar days or as soon as possible, while respecting project timelines. The WSDOT Tribal Liaison Office – HQ is available to facilitate communications if necessary.

VIII. Period of Performance

A. Once signed by all parties, the conditions of this MOA shall be in effect until amended or terminated by agreement of any of the signatory parties.

IX. Terms and Conditions

A. Nothing in this MOA limits, waives, or expands the sovereign immunity, jurisdiction, regulatory authority, or any other right or responsibility of any party.

B. Nothing in this MOA is intended nor shall be construed to expand, limit, restrict, or otherwise impair any right reserved by the LN pursuant to the Point Elliot Treaty or any right of the LN pursuant to applicable federal or state law.

C. If a signatory of this MOA determines that its terms cannot be met or that a change is necessary to meet the requirements of the law, that signatory will request that the other signatories consider an amendment or addendum. The amendment or addendum will address changes or modifications so that the terms of this MOA and the requirements of the law can be met.

D. Amendments, supplements, or revisions to this MOA may be proposed by any signatory party and shall become effective upon formal approval by all parties.

E. Any signatory to this MOA may suspend it by providing 30-days written notification to the other parties. Consultation will occur in order to resolve issues and reinstate this MOA upon written notification to all parties.

X. Other Agreements Not Precluded

A. A separate agreement is in place defining how the FHWA, the WSDOT NWR, and the LN will consult on projects that may affect cultural resources. Consultation will address a wide range of issues stemming from the various planning, design, and construction activities contained within WSDOT NWR operations and programs. It is not intended that this MOA be contingent on other agreements; however, if the parties determine that it is desirable to develop agreements to address specific areas of interest, this MOA is not intended to preclude such agreements.

Federal Highway Administration Washington Division

Daniel M. Mathis — Date: 10/13/06
Division Administrator

Washington State Department of Transportation Northwest Region

Lorena Eng — Date: 10/13/06
Northwest Region Administrator

Lummi Nation

Merle Jefferson, Executive Director — Date: 10/13/06
Lummi Natural Resources Department

APPENDIX A

FHWA/WSDOT/LNR MOA Regarding Consultation On State Transportation Activities That May Affect Natural Resources

WSDOT Northwest Region Contact Information

Martin Palmer Environmental Manager WSDOT Northwest Region 15700 Dayton Avenue North PO Box 330310 Seattle, WA 98133-9710	Telephone: (206) 440-4548 Email: palmems@wsdot.wa.gov
Ed Conyers Local Programs Engineer WSDOT Northwest Region 15700 Dayton Avenue North PO Box 330310 Seattle, WA 98133-9710	Telephone: (206) 440-4734 Email: conyere@wsdot.wa.gov
Todd Harrison Assistant Regional Administrator WSDOT Northwest Region, Mt. Baker Office 1415 Pacific Drive Burlington, WA 98233	Telephone: (360) 757-5990 Email: harrist@wsdot.wa.gov
Megan Beeby WSDOT Environmental Services Tribal Liaison PO Box 47331. Olympia, WA 98502	Telephone: (360) 705-7494 Email: beebym@wsdot.wa.gov

APPENDIX B

FHWA/WSDOT/LNR MOA Regarding Consultation On State Transportation Activities That May Affect Natural Resources

Lummi Natural Resources Department Contact Information

Mr. Merle Jefferson, Sr.
Executive Director
Lummi Natural Resources Department
2616 Kwina Road
Bellingham, WA 98226

Telephone: 360-384-2225
FAX: 360-384-4737
Email: merlej@lummi-nsn.gov

Mr. Leroy Deardorff
Environmental Program Director
Lummi Natural Resources Department
2616 Kwina Road
Bellingham, WA 98226

Telephone: 360-384-2272
FAX: 360-384-4737
Email: leroyd@lummi-nsn.gov

Mr. Jeremy Freimund, P.H.
Water Resources Manager
Lummi Natural Resources Department
2616 Kwina Road
Bellingham, WA 98226

Telephone: 360-384-2212
FAX: 360-384-4737
Email: jeremyf@lummi-nsn.gov