APPENDIX C SECTION 106 PROGRAMMATIC AGREEMENT

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PROGRAMMATIC AGREEMENT
Pursuant to Section 106 of the National Historic Preservation Act of 1966

Among

The Federal Highway Administration,
The Washington State Historic Preservation Officer,
The Washington State Department of Transportation,
The Muckleshoot Indian Tribe, and
The Snoqualmie Indian Tribe

For Improvements to Interstate 405 (I-405) Corridor,
King County and Snohomish County, Washington

WHEREAS, the U.S. Department of Transportation, Federal Highway Administration (FHWA), may provide assistance to the Washington State Department of Transportation (WSDOT) to make improvements to Interstate Highway 405 Corridor in King County and Snohomish County, Washington (the program), to provide multi-modal congestion relief; and

WHEREAS, FHWA issued a corridor level Record of Decision (ROD) under the National Environmental Policy Act (NEPA) for the program on October 9, 2002, covering the Selected Alternative, as identified in the ROD, which attempts to substantially improve mobility options for all travel modes and to provide a high capacity transit system throughout the study area, as described in the final environmental impact statement (FEIS) issued by the FHWA as FHWA-WA-EIS-01-01-F, approved on June 10, 2002 and issued on June 28, 2002; and

WHEREAS, the improvements within the I-405 Corridor program have been divided into individual projects for design and funding purposes; and

WHEREAS, some of the projects are not yet fully funded, meaning that some properties which are planned to be purchased are not currently available and/or may be inaccessible for study; and

WHEREAS, the projects may be implemented using a design-build procurement process, which integrates the final design and construction phases; and

WHEREAS, the design-build process requires flexibility in the location of certain ground-disturbing elements, including but not limited to stormwater detention ponds and ecology embankments, meaning that the location of some ground-disturbing elements may not be known until immediately prior to construction; and

WHEREAS, a NEPA environmental analysis which, among other things, considers impacts to historic properties in coordination with provisions of the NHPA, will be conducted for each individual project; and

WHEREAS, according to 36 CFR § 800.16 (l) 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 maintained by the Secretary of the Interior. 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 or Native Hawaiian organization and that meet the National Register criteria;" and

WHEREAS, FHWA and WSDOT, in consultation with the Washington State Historic Preservation Officer (SHPO) and affected and interested Indian tribes, will conduct cultural resource studies for each individual project to identify and evaluate historic properties located within the project's Area of Potential Effects (APE) which are listed in or eligible for listing in the National Register of Historic Places (National Register); and

WHEREAS, FHWA and WSDOT have determined that the design-build process and phased funding for the projects means that some of the project effects upon historic properties can not be determined until property is acquired or the design is completed by the design/build contractor, and that this Agreement is authorized by 36 C.F.R. § 800.14(b)(1)(ii); and

WHEREAS, FHWA and WSDOT have determined, in consultation with SHPO, that the APE for the projects, as defined in 36 CFR § 800.16(d) of the Council's regulations, are defined as (1) all areas where ground disturbance is planned, including but not limited to: clearing and grubbing, grading, bridge foundations, retaining walls, noise walls, detention ponds, conveyances, and ecology embankments, creation or enhancement of wetland mitigation sites, and staging and stockpiling areas, and (2) historic properties located either one tax lot on each side of the affected rights-of-way or 200 feet from their margins, whichever is less; and

WHEREAS, the Advisory Council on Historic Preservation has been invited to participate in the development of this Agreement, and has declined to participate; and

WHEREAS, the following parties have been consulted and invited to concur with this Agreement: Muckleshoot Indian Tribe, Snoqualmie Tribe, Tulalip Tribes, Yakama Nation, and Duwamish Tribe; and

WHEREAS, the Muckleshoot Indian Tribe and Snoqualmie Indian Tribe have agreed to be concurring parties to this Agreement, and

WHEREAS, the Yakama Nation, the Duwamish Tribe, and the Tulalip Indian Tribes have chosen to not participate in this Agreement; and

WHEREAS, pursuant to 36 CFR § 800.2(c)(4) FHWA has authorized WSDOT to initiate consultation with SHPO, but still retains legal responsibility for all findings and determinations of eligibility and effect; and

WHEREAS, pursuant to 36 CFR § 800.13, FHWA WSDOT, and SHPO have developed procedures in this Agreement to ensure that the identification and evaluation of historic properties, assessment of effects, and development of treatment and mitigation plans for

unforeseen effects to previously identified historic properties and/or historic properties discovered during implementation of the projects are properly coordinated with all phases of the design and construction of the projects; and

NOW, THEREFORE, FHWA, WSDOT and SHPO agree that the projects shall be implemented in accordance with the following stipulations in order to take into account foreseen and unforeseen future effects to historic properties.

STIPULATIONS

FHWA, in coordination with WSDOT, will ensure that the following measures are carried out.

I. GENERAL PROCESS FOR CONSIDERATION OF HISTORIC PROPERTIES

A. Prior to concluding the project-specific NEPA process, FHWA and WSDOT shall conduct a cultural resources survey to identify and evaluate historic properties in areas where project effects can be predicted prior to final design or purchase. For some of the I-405 projects, these surveys are already underway. For each survey:

1. Consulting parties will have the opportunity to review and comment on the project's Area of Potential Effects.

2. All potentially historic above-ground structures will be evaluated in the survey report. Level of evaluation may vary and will be determined in consultation with DAHP.

3. Archaeological survey will be conducted in known and accessible areas of proposed ground disturbance within funded portions of the project.

4. Consulting parties will be notified of any archaeological finds, and offered the opportunity to comment on evaluation methods and observe fieldwork.

5. All consulting parties will be afforded the opportunity to review and comment on the results of the survey, and on the historic properties determinations made by FHWA, per 36 CFR § 800.4.

B. After design of project elements, or after purchase of property, whichever is appropriate depending on the level of design detail needed, FHWA and WSDOT will conduct studies as described in Stipulations III and IV for project elements that were not previously considered as described in Stipulation I.A.

C. FHWA and WSDOT will ensure that all work under this Agreement is performed by or under the direct supervision of a qualified individual(s) in the appropriate historic preservation discipline who meets, at a minimum, the Secretary of Interior's Professional Qualification Standards as set forth in 36 CFR § 61. Under certain circumstances it may be appropriate to have a tribal monitor (who is not required to meet the Secretary of Interior's Professional Qualification Standards) involved in the work being performed.

D. FHWA and WSDOT affirm that avoidance of adverse effects to historic properties remains the preferred course of action and that design activities may include the shifting of project elements if feasible to avoid adverse effects to historic properties.

E. If adverse effects to historic properties cannot be avoided, FHWA and WSDOT will seek to resolve the adverse effect in consultation with the signatories, consulting parties, and the public, as described in 36 CFR § 800.6 and further explained in Stipulation VI.

F. FHWA and WSDOT will ensure that the design-build contractor is aware of, understands, and complies with the requirements of this Agreement. The design-build contractor shall ensure that its sub-contractors comply with the requirements of this Agreement. Compliance with this Agreement shall be required as part of the project contract and will be included in the project contract.

II. PUBLIC PARTICIPATION

A. FHWA and WSDOT will ensure opportunities for public participation for Section 106-related activities conducted after the project-specific NEPA process is complete. Modified versions of reports on historic properties (locational information removed as appropriate, in accordance with state and federal laws) will be made available for review to the general public at the I-405 Project Office, or on the WSDOT website, or through other reasonable means. The views of interested parties and the general public will be considered by FHWA and WSDOT with respect to the terms of this Agreement.

B. To the extent required by Section 304 of the NHPA and Section 9 of the Archaeological Resources Protection Act of 1979 (ARPA) (16 U.S.C. 470hh), the signatories and participating concurring parties to this Agreement will withhold from disclosure to the public information about the location, character, or ownership of a historic property until the Secretary of the Interior can determine whether disclosure may (1) cause a significant invasion of privacy, (2) risk harm to a historic property, or (3) impact the significance or use of a traditional religious site by practitioners. To the extent authorized by state and federal law, information will also be withheld from disclosure at the owner's request.

III. POST-NEPA CONSIDERATION OF PREVIOUSLY INACCESSIBLE PROPERTY

A. In certain circumstances, cultural resource investigations are not possible or practicable at the time of the NEPA analysis due to private ownership or physical inaccessibility. In these cases, cultural resource investigations may be deferred until the property has been acquired by WSDOT.

B. Once properties have been acquired by WSDOT, and sufficient design detail is available to know where ground disturbance will occur, FHWA and WSDOT, will work together to determine whether proposed activity at the property has the potential to affect historic

properties. This determination may be made using the terrain map described in Stipulation IV.C. WSDOT will notify SHPO and the concurring parties of the determination via email and telephone. SHPO and the concurring parties will review the documentation and respond within thirty (30) calendar days.

C. FHWA and WSDOT, in consultation with SHPO and the concurring parties, may determine that further study is necessary. This may require fieldwork, including pedestrian survey and subsurface testing.

D. If subsurface testing is required to determine whether archaeological resources are present, WSDOT will obtain the concurrence of FHWA prior to notifying the design-build contractor, if under contract. The maximum extent of construction-related ground disturbance will be defined and flagged by the design-build contractor, if under contract, or by WSDOT.

E. WSDOT will arrange to have the fieldwork conducted by a qualified professional, consistent with Stipulation I.C.

F. Testing must be consistent with the I-405 Corridor Program Cultural Resources Assessment Guidelines (Appendix A).

IV. DESIGN-BUILD PROCEDURES

A. Due to the nature of the design-build process, the exact location of some ground disturbing project elements, such as support columns, detention ponds, or stormwater conveyance alignments, will be designed by the design-build contractor. The interval between the design of an element and its construction may be too short to perform standard Section 106 identification, evaluation, and assessment of effects on an historic property.

B. Adverse effects on archaeological historic properties will be prevented or minimized in two ways: a phased series of terrain surveys to identify completely disturbed, covered-by-fill, and relatively lightly disturbed areas, assuming that disturbance is the largest factor affecting archaeological potential (Stipulation IV.C.); and development of streamlined protocol for resource review and resolution of adverse effects (Stipulations V and VI.A.).

C. The archaeological potential of specific terrain areas within the I-405 project areas, based on extent and type of previous ground disturbance, will be established using the following methods:

1. Within each project area, WSDOT Cultural Resources Specialists (CRS) will determine the archaeological potential of specific zones based on the locations of the original cut-and-fill lines and corresponding extent of disturbance for the construction of I-405 using low-elevation aerial photographs, as-built maps, recent topographic

maps produced by I-405 program, previous archaeological studies, and ground reconnaissance.

2. The CRS will verify existing terrain conditions by windshield survey, pedestrian survey, and shovel/auger/probe testing as necessary. Specific terrain zones will be delineated precisely on a map.

3. Zones where Holocene era native surfaces and post-glacial soils and sediments have been removed entirely will be considered "Unrestricted." The design-builder may locate any ground-disturbing project element in an Unrestricted Zone without any further cultural resources review.

4. Zones identified as having deep fill, where native soils and possibly buried surfaces still may be present under the fill will be classified as "Fill Zones." Each fill zone will be labeled on the map with a number indicating estimated depth of fill. The design-builder may locate any ground-disturbing project element in a Fill Zone when design indicates disturbance will not exceed three-quarters (3/4) the fill depth (to account for over-excavation).

5. Zones identified as having little to no previous ground disturbance, where native sediments and buried surfaces are likely to be present will be classified as "Restricted Zones." The design-builder may NOT locate any ground-disturbing project element, regardless of the depth of the projected ground disturbance, in a Restricted Zone until it is reviewed and approved (in email or letter) by the WSDOT in consultation with interested and affected tribes and SHPO (see Stipulation IV.D).

6. WSDOT will provide a printed map showing the locations of Unrestricted, Fill, and Restricted Zones, and an electronic data file of the map, to the interested and affected tribes and SHPO.

7. Tribes and SHPO will have thirty (30) calendar days to review the map and associated documentation.

8. WSDOT CRS will amend the map based on tribal and SHPO comments, if necessary, and provide a final paper map and electronic file to the Tribes, SHPO, FHWA, and the design-build contractor.

D. If the design-build contractor wishes to change the location of a ground-disturbing project element within a Restricted Zone or to a Restricted Zone, the contractor must notify WSDOT 15 days prior to scheduled ground disturbance. WSDOT CRS will review the project element description and location.

1. The WSDOT CRS will determine, in consultation with interested and affected tribes and SHPO, whether a cultural resources survey is required. Survey will only be required if the area has not already been adequately investigated or characterized. If a

survey is required, it must be consistent with the I-405 Corridor Program Cultural Resources Assessment Guidelines (Appendix A).

2. If a survey is required, WSDOT will notify FHWA prior to notifying the design-build contractor, if under contract. The maximum extent of construction-related ground disturbance will be defined and flagged by the design-build contractor, if under contract, or by WSDOT. WSDOT will arrange to have the archaeological work conducted by a qualified professional, consistent with Stipulation I.C.

3. DAHP and the interested and affected tribes will have ten (10) calendar days to review the survey results and either concur with the findings, or notify WSDOT and FHWA that DAHP does not concur.

4. WSDOT will ensure that no more than two (2) project elements are under review at any time by DAHP and the interested and affected tribes.

5. Work will not proceed until a survey has been completed, tribes have been consulted, and SHPO has concurred with the findings of the survey, per provisions of 36 CFR § 800.

E. Staging, parking, or material storage areas, or temporary buildings (hereafter, "staging areas"), may be located on any paved or prepared gravel surface, provided that the use will not require penetrating the pavement or gravel surface. For staging areas not on paved or prepared gravel surfaces, or penetrating through those surfaces:

1. Within the right-of-way, the contractor may locate staging areas in an unrestricted zone regardless of planned ground disturbance, or in a fill zone as long as planned ground disturbance is less than 3/4 of the known depth of the fill. In a restricted zone, the staging area must be reviewed as in Stipulation IV.D.

2. Outside the right-of-way, any staging, parking, or material storage areas, or temporary buildings not located on pavement or prepared gravel surfaces must be reviewed as in Stipulation IV.D.

V. COORDINATION OF REVIEWS

A. Consulting parties and SHPO will have a review period of thirty (30) calendar days for commenting on all documents, resource evaluations of significance, treatment plans and specifications under the terms of this Agreement, except as described in Stipulation IV. D.3. If multiple historic properties are involved, the review time may be extended, as appropriate, by FHWA.

B. SHPO and the other consulting parties recognize the time-sensitive nature of the project work and will attempt to expedite comments or concurrence when requested, if possible. If SHPO or other consulting parties fail to provide comments within the designated

review period, FHWA will assume their concurrence and proceed with the proposed action or activity.

VI. POST-NEPA AND POST-REVIEW DISCOVERIES

A. If an archaeological resource is identified in a Fill or Restricted Zone during subsurface testing associated with design-build project elements, and cannot be avoided by project redesign, it will be considered eligible for listing in the National Register of Historic Places and subjected to mitigation measures (including but not necessarily limited to data recovery), following procedures outlined in 36 CFR § 800.13(b) and § 800.13(c). Mitigation measures will be determined in consultation with the consulting parties.

B. If WSDOT or FHWA, in consultation with DAHP and interested and affected tribes, determines that an archaeological resource is not eligible for listing in the National Register of Historic Places, work may proceed with no further cultural resources investigation.

C. If previously unidentified archaeological resources are identified during ground-disturbing activities during the construction or during post-construction maintenance or improvement, such activities shall cease in the immediate area of the discovery and the WSDOT I-405 Environmental Manager will follow the procedures outlined in the I-405 Corridor Unanticipated Archaeological Discovery Plan (Appendix B) .

VII. DISPUTE RESOLUTION

A. Should any consulting party object, in writing, within five (5) calendar days to the implementation of the terms of this Agreement, FHWA and WSDOT shall work with the disputing party to resolve the dispute. If FHWA determines that the objection cannot be resolved, FHWA shall forward all documentation relevant to the dispute to the Advisory Council on Historic Preservation (Council) and request that the Council comment.

B. Any Council comment provided in response to such request shall be taken into account by the FHWA in accordance with 36 CFR § 800.7(c)(4) with reference only to the subject of the dispute. The FHWA responsibility to carry out all other actions and activities under this Agreement that are not the subject of the dispute remain unchanged.

VIII. AMENDMENTS AND NONCOMPLIANCE.

A. If FHWA, WSDOT, or SHPO determines that the terms of this Agreement will not or cannot be carried out or that an amendment to its terms must be made, that party shall provide a written explanation for such a determination to all signatories and immediately consult with the other signatories to develop an amendment to this Agreement. The

amendment will be effective on the date a copy is signed by FHWA, SHPO, and WSDOT.

B. If the signatories cannot agree to appropriate terms to amend this Agreement, any one of these parties unilaterally may terminate the agreement in accordance with Stipulation X, below.

IX. EMERGENCY SITUATIONS

Should an emergency situation occur which represents an imminent threat to public health or safety, or creates a hazardous condition, the FHWA and WSDOT shall immediately notify SHPO and consulting parties of the situation and the measures taken to respond to the emergency or hazardous condition. Should SHPO or consulting parties desire to comment or provide technical assistance to the WSDOT, they shall immediately notify WSDOT via email and telephone of their intent to submit comments and shall submit the comments within five (5) calendar days of WSDOT's initial notification, if the nature of the emergency or hazardous condition allows for such coordination.

X. TERMINATION

A. If FHWA or WSDOT determines that it cannot implement the terms of this Agreement, or if SHPO determines that this Agreement is not being properly implemented, FHWA, WSDOT, or SHPO may propose to the other parties that the Agreement be terminated.

B. The party proposing to terminate this Agreement shall notify all parties to this Agreement accordingly in writing, explaining the reasons for termination and affording them at least thirty (30) days to consult and seek alternatives to termination.

C. Should such consultation fail and this Agreement is terminated, the FHWA shall either:

1. Consult in accordance with 36 CFR § 800.6 to develop a new Agreement; or

2. Request the comments of the Council pursuant to 36 CFR § 800.7 and take into account such comments in accordance with such section prior to continuing the project.

By:

Federal Highway Administration, Division Administrator

_____ _____
Daniel M. Mathis Date

Washington State Department of Transportation, Urban Corridors Office, Deputy Administrator

_____ _____
Craig Stone Date

Washington State Historic Preservation Officer

_____ _____
Allyson Brooks Date

Concur:

Muckleshoot Indian Tribe, Chairperson

_____ _____
Charlotte Williams Date

Snoqualmie Tribe, Chairperson

_____ _____
Bill Sweet Date

Appendices:
Appendix A: I-405 Corridor Program Cultural Resources Assessment Guidelines
Appendix B: I-405 Corridor Program Unanticipated Archaeological Discovery Plan