

WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION

TRIBAL ORAL HISTORY COMPILATION AGREEMENT ACTUAL COST		ORGANIZATION AND ADDRESS: Confederated Tribes of the Umatilla Indian Reservation PO Box 638 Pendleton, OR 97801
AGREEMENT NUMBER GCA 5831	MAXIMUM AMOUNT PAYABLE: \$20,997.10	PROJECT TITLE AND DESCRIPTION OF WORK: Columbia River Crossing Project Preparation of the Tribe's oral history pertinent to the CRC Project.

THIS Agreement is made and entered into between the Washington State Department of Transportation, hereinafter the "WSDOT", and the Confederated Tribes of the Umatilla Indian Reservation, a federally recognized Indian tribe, hereinafter the "UMATILLA TRIBE", collectively "PARTIES" and individually "PARTY".

WHEREAS, WSDOT has a project that affects the Columbia River area, called the Columbia River Crossing Project ("CRCP"), around which numerous tribes claim historical use; and

WHEREAS, the Federal and State governments and the UMATILLA TRIBE have an interest in the conservation, preservation, and protection of the State's and UMATILLA TRIBE's resources of interest; and

WHEREAS, the WSDOT desires to have the UMATILLA TRIBE provide, and the UMATILLA TRIBE desires to provide an Oral History Compilation of the UMATILLA TRIBE which may provide insight as to the identification of Traditional Cultural Properties (TCPs) and other resources of significance to the UMATILLA TRIBE which could be affected by the Columbia River Crossing Project (CRCP); and

WHEREAS, the Executive Director for the UMATILLA TRIBES has authority to sign this AGREEMENT and any and all documents necessary to its implementation;

NOW, THEREFORE, by virtue of RCW 39.34 and in consideration of the terms, conditions, covenants, and performances contained herein, or attached and incorporated and made a part hereof, IT IS MUTUALLY AGREED AS FOLLOWS:

Section 1

Scope of Work

1.1 The work of the UMATILLA TRIBE is to perform services necessary to complete the Scope Of Work, attached hereto as Exhibit "A" and by this reference made a part of this AGREEMENT. These services are and may include, but are not limited to, the following:

1.1.1 Identify and locate up to, but not limited to, six individuals able to provide oral history information about the UMATILLA TRIBE's historical activities in proximity to WSDOT's CRC Project.

1.1.2 If required to accurately complete the Oral History Compilation, perform on-site inspections to locate sites of cultural importance.

1.1.3 By November 30, 2008, provide WSDOT with an Oral History Compilation containing information pertinent to the identification of Traditional Cultural Properties (TCPs) and other resources of significance to the UMATILLA TRIBE which could be affected by the Columbia River Crossing Project (CRCP).

1.1.4 This Oral History Compilation will contain sufficient information, details and supporting documentation about the TCPs to allow WSDOT to make rational and sound business decisions regarding the CRC Project. At the same time, the Oral History Compilation should to the greatest extent possible avoid disclosing information that is sensitive and confidential to the UMATILLA TRIBE or Tribal members.

1.1.5 Should disclosure of sensitive and confidential Tribal information to WSDOT be unavoidable, the UMATILLA TRIBE will mark the Oral History Compilation, or parts thereof, "confidential" and WSDOT will maintain confidentiality to the extent allowed under State and Federal Law.

1.1.6 The UMATILLA TRIBE will have complete responsibility for determining the appropriate Tribal employees and/or other Tribal members used in obtaining the UMATILLA TRIBE's oral history. All Tribal members retained by the UMATILLA TRIBE and their associated fee rates and costs must be approved by the WSDOT prior to starting work. The fee rates and costs shall be limited to those referred to in Section 4, Payment. The UMATILLA TRIBE shall not charge WSDOT any mark-up or profit on non-employees rates or costs. Only Tribal employees and Tribal members retained as described here may be used to perform the scope of work.

Section 2

Time for Beginning and Completion

2.1 This AGREEMENT shall become effective upon the month, day and year last signed below. All work shall be completed by October 31, 2008 and the AGREEMENT shall terminate on December 31, 2008 unless terminated sooner according to the terms in Section 14, "Termination of Agreement".

**Section 4
Payment**

4.1 WSDOT agrees to pay the UMATILLA TRIBE for actual direct costs incurred up to a maximum of \$20,997.10 in accordance with the budget attached hereto as "Exhibit B" for the services provided pursuant to this agreement.

**Section 5
Inspection of Work**

5.1 The WSDOT will at all times be accorded proper facilities for review and inspection of the work hereunder and will at all reasonable times have access to the premises, and to all data, notes, records, correspondence, instructions, and memoranda of every description pertaining to the work hereunder.

**Section 6
Ownership of Data**

- 6.1 WSDOT shall own the oral history compilation provided to it pursuant to Section 1.1 this Agreement. All information contained within any such report that pertains to the location of archaeological sites or objects shall be kept confidential, to the extent allowed by federal and state law, and shall not be subject to disclosure pursuant to a Washington State public disclosure act request. All other intellectual property, including but not limited to work product, shall be the property of the UMATILLA TRIBE.
- 6.2 The PARTIES agree that the Oral History Compilation must contain sufficient information, details and supporting documentation about the TCPs to allow WSDOT to make rational and sound business decisions regarding the CRC Project. However, at the same time, The Umatilla Tribe, drafters of the Oral History Compilation, should to the greatest extent possible avoid disclosing information that is sensitive and confidential to the UMATILLA TRIBE or Tribal members. Furthermore, WSDOT shall withhold from public disclosure any and all information obtained from the UMATILLA TRIBE that is subject to exclusion under Washington's PDA. In addition, the WSDOT shall withhold from public disclosure all records, maps or other information identifying the location of any and all archaeological sites including information related to the study being conducted pursuant to RCW 42.56.300. In the event of breach of this provision, the UMATILLA TRIBE may terminate this Agreement immediately without notice and pursue any remedy provided by law.

**Section 7
Publication**

7.1 Should the Oral History Compilation or any other data, reports or documents submitted to WSDOT under this Agreement, contain information that the UMATILLA TRIBE deems sensitive and confidential, such documents will be marked "Confidential" by the TRIBE. All work marked "Confidential" will be considered confidential and exempt from public disclosure to the extent authorized by federal and state law.

Section 8 Employment

8.1 The UMATILLA TRIBE warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for the UMATILLA TRIBE, to solicit or secure this AGREEMENT, and that it has not paid or agreed to pay any company or person, other than a bona fide employee working solely for the UMATILLA TRIBE, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of this AGREEMENT. For breach or violation of this warrant, the WSDOT shall have the right to annul this AGREEMENT, without liability, or, at its discretion, to deduct from the AGREEMENT price or consideration or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee.

8.2 Any and all employees of the UMATILLA TRIBE or Tribal members engaged in the performance of any work or services required of the UMATILLA TRIBE under this AGREEMENT, shall not be considered employees of the WSDOT. Any and all claims that may arise on behalf of said employees or Tribal members, while so engaged, and any and all claims made by a third party as a consequence of any act or omission on the part of the UMATILLA TRIBE's employees or Tribal Members while so engaged, shall be the sole obligation and responsibility of the UMATILLA TRIBE.

Section 9 Non-Discrimination

9.1 The UMATILLA TRIBE agrees not to discriminate against any client, employee, or applicant for employment or for services because of race, creed, color, national origin, marital status, sex, age, or handicap except for a bona fide occupational qualification with regard to, but not limited to the following: employment upgrading, demotion or transfer; recruitment or any recruitment advertising; layoff or termination; rate of pay or other forms of compensation; selection for training; rendition of services. The UMATILLA TRIBE understands and agrees that if it violates this non-discrimination provision, this AGREEMENT, may be terminated by the WSDOT through the Agreement Manager located in Vancouver Washington now or in the future, unless a showing is made satisfactory to the WSDOT that discriminatory practices have terminated and that recurrence of such action is unlikely. Provided, however, that the terms and provisions of this section shall not be construed to prevent the UMATILLA TRIBE from giving Indian Preference as permitted by Federal law.

9.2 During the performance of this contract, the UMATILLA TRIBE, for itself, its assignees and successors in interest agrees as follows:

9.2.1 Compliance with regulations: The UMATILLA TRIBE shall comply with the regulations relative to nondiscrimination in the same manner as in federally assisted programs of the Department of Transportation, Title 49, Code of Federal Regulations, Part 21 (hereinafter referred to as the Regulations) as they may be amended from time to time, which are herein incorporated by reference and made a part of this AGREEMENT.

9.2.2 Nondiscrimination: With regard to work it performs under this AGREEMENT, the UMATILLA TRIBE shall not discriminate on the grounds of race, creed, color, sex,

age, marital status, national origin, or handicap, except for a bona fide occupational qualification in the selection and retention of Tribal Consultants, and the procurements of materials and leases of equipment. The UMATILLA TRIBE shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the AGREEMENT covers a program set forth in Appendix 11 of the Regulations.

9.2.3 Information and Reports: The UMATILLA TRIBE shall provide all information and reports required by the Regulations, or directive issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information related solely to the work completed under this AGREEMENT, and its facilities as may be determined by the WSDOT to be pertinent to ascertain compliance with such Regulations or directives. Where any information required of the UMATILLA TRIBE is in the exclusive possession of another who fails or refuses to furnish this information, the UMATILLA TRIBE shall so certify to the WSDOT or Federal Highway Administration, as appropriate, and shall set forth what efforts it has made to obtain the information.

9.2.4 Sanctions for Noncompliance: In the event of the UMATILLA TRIBE's noncompliance with the nondiscrimination provisions of this contract, the WSDOT shall impose such contract sanctions which it or the Federal Highway Administration may determine to be appropriate, including, but not limited to:

- a. Withholding of payments to the UMATILLA TRIBE under the AGREEMENT until compliance, and/or
- b. Cancellation, termination, or suspension of the AGREEMENT, in whole or in part.

9.2.5 Incorporation of Provisions: The UMATILLA TRIBE shall include the provisions of paragraphs 9.2.1 through 9.2.4 above in every subcontract, including the hiring of Tribal members, unless exempted by the Regulations or directives issued pursuant thereto. The UMATILLA TRIBE shall take such action with respect to any Tribal Consultant or procurement as is determined after consultation between the UMATILLA TRIBE Tribal Council and its legal council, the WSDOT and the Federal Highway Administration, and may direct as a mean of enforcing such provisions, including sanctions for noncompliance; provided, however, that in the event the UMATILLA TRIBE becomes involved in, or is threatened with, litigation with a consultant or supplier as a result of such direction, the UMATILLA TRIBE may request the WSDOT to enter into such litigation to protect the interest of the WSDOT, and, in addition, the UMATILLA TRIBE may request the United States to enter into such litigation to protect the interests of the United States.

Section 10 Amendment

10.1 This AGREEMENT may only be modified by written amendment to this AGREEMENT. Any amendment shall be mutually agreed upon in writing prior to undertaking any work or incurring any costs covered by such amendment. Changes to this AGREEMENT

shall be made in writing and signed by the WSDOT Agreement Manager located in Vancouver Washington and by an authorized UMATILLA TRIBE official.

Section 11
Assignment of Work

11.1 The UMATILLA TRIBE shall not assign any of the work covered by this AGREEMENT without prior written approval of the WSDOT. If time is of the essence, verbal approval may be granted by the WSDOT Agreement Manager located in Vancouver, Washington, and will be confirmed in writing within three (3) days.

Section 12
Legal Relations

12.1 UMATILLA TRIBE shall comply with all federal, state, and local laws and ordinances to the work to be done under this AGREEMENT.

12.2 The UMATILLA TRIBE shall indemnify and hold the State, its agencies, officers, employees and agents, both individually and in their representative capacities, harmless from and shall process and defend at its own expense any and all claims, demands, suits at law or equity, actions, penalties, losses, damages or costs of whatever kind or nature against the State arising in whole or in part from the UMATILLA TRIBE's, its employees, agents, and/or Tribal members engaged in work under this AGREEMENT, negligence or the UMATILLA TRIBE's breach of any of its obligations under this AGREEMENT; provided, however, that if such claims are caused by or result from the concurrent negligence of (a) the UMATILLA TRIBE, its employees, agents, and/or Tribal members engaged in work under this AGREEMENT and (b) the State, its agencies, officers, employees and/or agents, this indemnity provision shall be valid and enforceable only to the extent of the negligence of UMATILLA TRIBE, its employees, agents, and/or Tribal members engaged in work under this AGREEMENT; and provided further that nothing herein shall require UMATILLA TRIBE to hold harmless or defend the State, its agencies, officers, employees and/or agents from any claims arising from the sole negligence of the State, its agencies, officers, employees and/or agents.

12.3 UMATILLA TRIBE's relation to the State shall be at all times as an independent contractor.

12.4 UMATILLA TRIBE agrees to waive its immunity under Title 51 RCW only to the extent required to indemnify, defend and save harmless the State, its agencies, officers, employees and/or agents for the work performed under this AGREEMENT.

12.5 These indemnifications and waivers shall survive any termination of this AGREEMENT.

Section 13
Remedies Cumulative

13.1 All remedies provided in this AGREEMENT are distinct and cumulative to any other right or remedy under this document or afforded by law or equity, and may be exercised independently, concurrently, or successively therewith.

Section 14
Termination of Agreement

14.1 The right is reserved by the PARTIES to terminate this AGREEMENT at any time upon thirty (30) days written notice, by certified mail, to the designated representative of the other PARTY. The designated representatives for the PARTIES are as follows:

UMATILLA TRIBE: Executive Director
Confederated Tribes of the
Umatilla Indian Reservation
PO Box 638
Pendleton, OR 97801

WSDOT: Agreement Manager
Columbia River Crossing Project
700 Washington Street, Suite 300
Vancouver, WA 98660

14.2 In the event this AGREEMENT is terminated by the WSDOT through the WSDOT Agreement Manager located in Vancouver Washington other than for default on the part of the UMATILLA TRIBE, a final payment shall be made to the UMATILLA TRIBE which, when added to any payments previously made, shall total the actual costs of the work completed at the time of termination.

14.3 No payment shall be made for any work completed after ten days following receipt by the UMATILLA TRIBE of the notice of termination. If the accumulated payment made to the UMATILLA TRIBE prior to notice of termination exceeds the total amount that would be due when computed as set forth herein above, then no final payment shall be due and the UMATILLA TRIBE shall immediately reimburse the WSDOT for any excess paid.

14.4 If the services of the UMATILLA TRIBE are terminated by the WSDOT through the WSDOT Agreement Manager located in Vancouver Washington for default on the part of the UMATILLA TRIBE, the above formula for payment shall not apply. In such an event, the amount to be paid shall be determined by the WSDOT with consideration given to the actual costs incurred by the UMATILLA TRIBE in performing the work to the date of termination, the amount of work originally required which was satisfactorily completed to date of termination, whether that work is in a form or a type which is usable to the WSDOT at the time of termination; the cost to the WSDOT to employ another firm to complete the work required and the time which may be required to do so, and other factors which affect the value to the WSDOT of the work performed at the time of termination. Under no circumstances shall payment made under this subsection exceed the amount which would have been made using the formula set forth in the previous paragraph.

14.5 If it is determined for any reason that the UMATILLA TRIBE was not in default or that the failure to perform was not the result of UMATILLA TRIBE, its employees or Tribal

Consultant(s) negligence, the termination shall be deemed to be a termination for the convenience of the WSDOT in accordance with the provisions of this AGREEMENT.

14.6 Payment for any part of the work by the WSDOT shall not constitute a waiver by the WSDOT of any remedies of any type it may have against the UMATILLA TRIBE for any breach of this AGREEMENT by the UMATILLA TRIBE, or for failure of the UMATILLA TRIBE to perform work required of it by the WSDOT. Forbearance of any rights under the AGREEMENT will not constitute waiver of entitlement to exercise those rights with respect to any further act or omission by the UMATILLA TRIBE.

Section 15 No State Obligations to Third Parties

15.1 No Agreement between the UMATILLA TRIBE and its non-employee members engaged under Section 1.1.4 shall create any obligation or liability of the WSDOT with regard to this AGREEMENT without the WSDOT's specific written consent and notwithstanding its concurrence in, or approval of, the award of any such Agreement or sub-Agreement or the solicitation thereof. The UMATILLA TRIBE hereby agrees to include this provision in all Agreements it enters into for work by any non-employee Tribal members.

Section 16 No Waiver of WSDOT's Rights

16.1 Neither the acceptance by the WSDOT nor any payment for the whole or any part of the work, nor any extension of time, nor any possession taken by the WSDOT shall operate as a waiver of any portion of the AGREEMENT or any power herein reserved or any right to damages herein provided, or bar recovery of any money wrongfully or erroneously paid to the UMATILLA TRIBE. A waiver of any breach of the AGREEMENT shall not be held as a waiver of any other or subsequent breach.

Section 17 Records Retention

17.1 The UMATILLA TRIBE shall maintain and retain, for a period of three years after the work has been completed, all cost records and accounts pertaining to this AGREEMENT and all items related to or bearing upon these records. If any litigation, claim, or audit has been started before the expiration of the three-year period, the records will be retained until all litigation, claims, or audit findings involving the records have been resolved. The three-year retention period starts when the UMATILLA TRIBE receives final payment under the terms of this AGREEMENT. These records shall be made available for inspection or audit to WSDOT or its authorized representative and/or any relevant United States government agency or its representative.

Section 18 Dispute Resolution Process

18.1 In the event that a dispute arises under this AGREEMENT which can not be resolved between the PARTIES, the dispute shall be settled in the following manner: Each

PARTY to this AGREEMENT shall appoint a member to a dispute board. The members so appointed shall jointly appoint a third member to the dispute board who is not employed by or affiliated with either of the PARTIES to this AGREEMENT. The dispute board shall evaluate the facts, contract terms, and applicable statutes and rules and make a determination of the dispute. The determination of the dispute board shall be final and binding on the PARTIES hereto.

18.2 Any costs associated with appointing the third member to the dispute board shall be shared equally between the two PARTIES.

Section 19 Insurance

19.1 General Requirements

During the term of the Agreement, the UMATILLA TRIBES shall maintain in full force and at its own expense each insurance coverage or policy noted below, from insurance companies that are authorized to transact insurance and issue coverage in the State of Washington and are acceptable to WSDOT. The UMATILLA TRIBES shall pay for all deductibles.

19.2 Commercial General Liability

The UMATILLA TRIBES shall obtain, at its expense, and keep in effect during the term of this Agreement, Commercial General Liability Insurance covering bodily injury and property damage in a form and with coverage that is satisfactory to WSDOT. This insurance shall include personal injury liability, products and completed operations, and contractual liability coverage for the indemnity provided under this Agreement, and is made on an occurrence basis. Combined single limit per occurrence shall not be less than \$1,000,000. Each annual aggregate limit shall not be less than \$1,000,000.

19.3 Automobile Liability Insurance: Automobile Liability

The UMATILLA TRIBES shall obtain, at its expense, and keep in effect during the term of this Agreement, Automobile Liability Insurance covering all owned, non-owned, or hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance. Combined single limit per occurrence shall not be less than \$1,000,000.

19.4 Additional Insured – Waiver of Reliance on Sovereign Immunity Defenses

19.4.1 The liability insurance coverage required for performance of the Agreement shall include the State of Washington, and its agencies, departments, divisions, commissions, branches, officers and employees as Additional Insureds but only with respect to the UMATILLA TRIBES' activities to be performed under this Agreement. Coverage shall be primary and non-contributory with any other insurance and self-insurance.

19.4.2 THE UMATILLA TRIBES INSURANCE POLICIES REQUIRED BY THIS AGREEMENT MUST HAVE AN ENDORSEMENT PROVIDING THAT THE NEITHER THE INSURER OR THE TRIBE MAY INVOKE TRIBAL SOVEREIGN IMMUNITY UP TO THE LIMITS OF THE POLICY IN ANY STATE OR FEDERAL COURT, IN CONNECTION WITH THE ENFORCEMENT OF THE RIGHTS OF THE STATE OR WSDOT PURSUANT TO THE PROVISIONS OF SECTION 12, INCLUDING WHEN THE TRIBE OR AN ENTITY OF THE TRIBE IS A NAMED DEFENDANT.

19.5 Certificate(s) of Insurance

Prior to performing under the Agreement, as evidence of the insurance coverage required by this Agreement, the UMATILLA TRIBES shall furnish Certificate(s) of Insurance for all required insurance to Authorized Purchaser prior to its commencement of work under this Agreement. The UMATILLA TRIBES' failure to present the required documents shall result in immediate Agreement termination. The Certificate(s) will specify all of the parties who are endorsed on the policy as Additional Insured (or Loss Payees).

Section 20 Limited Waiver of Tribal Sovereign Immunity

20.1 The UMATILLA TRIBES hereby agrees to a limited waiver of its sovereign immunity from suit solely pursuant to the limits and terms set forth in sections 19 and 20.2 herein.

20.2 Provided that all of the following conditions are met, the UMATILLA TRIBE grants to the WSDOT a limited waiver of its sovereign immunity to be sued under an explicit provision of this Agreement:

20.2.1 The claim is made by WSDOT, and not by any other party, whether an individual or an entity of any kind. The right to sue shall not be transferable;

20.2.2 The claim alleges a breach by the UMATILLA TRIBE of one or more specific duties owed to the WSDOT that is expressly assumed by the UMATILLA TRIBE under the terms of this Agreement. With exception to sections 19 and 20, no suit shall be had for any other reason;

20.2.3 The claim must seek either:

- (a) specific performance by the UMATILLA TRIBE to bring the UMATILLA TRIBE into compliance with the obligations or duties expressly assumed by the UMATILLA TRIBE in this Agreement, provided the cost of performance does not exceed the amount originally anticipated in the scope of work or accompanying budget; or
- (b) payment of a monetary judgment arising from a breach of an explicit duty owed by the UMATILLA TRIBE to the WSDOT under the terms of this Agreement, which shall not exceed the amount originally anticipated in the scope of work or accompanying budget; and

IN WITNESS WHEREOF, the parties hereto have executed this AGREEMENT as of the month, day and year last signed below.

UMATILLA TRIBE

By: *Donald Sampson*

Donald Sampson, Executive Director

Date: *8.26.08*

Approved as to form:

By: *Brent Leonard*
Brent Leonard, Deputy Attorney General
Umatilla Tribe

Date: *8/21/08*

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION

By: *Douglas P. Ficco*

Douglas P. Ficco, Director, PE
Columbia River Crossing Project

Date: *8-28-08*

Approved as to form:

By: *Elizabeth Lagerberg*
Elizabeth Lagerberg, Assistant Attorney
General

Office of the Attorney General, Washington
State
Date: *8 25 08*