

**Tribal Consultation Guidance for the
Federal Highway Administration, WV Division and the
West Virginia Department of Transportation, Division of Highways**

The Section 106 (36 CFR 800) of the National Historic Preservation Act (NHPA), United States Department of Transportation Order 5301.1 and Executive Order 13175, obligate federal agencies to work closely with Indian tribes in reaching decisions. As a federal agency, the Federal Highway Administration (FHWA), and by extension the West Virginia Department of Transportation, Division of Highways (WVDOH), need to make a reasonable and good faith effort to identify and consult with Indian tribes that may attach religious and cultural significance to historic properties affected by Federal-aid projects. For the purposes of this consultation guidance, Indian tribe refers to a federally recognized Indian tribe, as defined in 36 CFR 800.16(m), unless otherwise noted.

Historic properties of religious or cultural significance to Indian tribes may be located on tribal lands and/or on ancestral, aboriginal or ceded lands. While there are no tribal lands located within West Virginia, historic properties significant to Indian tribes may be present throughout the state and could be affected by WVDOH projects. Therefore, the purpose of this guidance is to advise WVDOH project managers how to best approach tribal consultation. As has been demonstrated in other states, developing a good working relationship with Indian tribes takes time.

At this time, a total of nineteen (19) federally recognized tribes have been identified that are likely to have an interest in West Virginia projects. Contact information for these Indian tribes can be found in Attachment A. A list of federally recognized tribes is maintained at the Bureau of Indian Affairs web site: <http://www.bia.gov> (click on “How Do I”). Federally recognized tribes have special status as a consulting party¹ under the regulations even for historic properties off tribal lands. In addition, each tribe is a sovereign nation. Therefore, FHWA as part of the Federal Government engages in government-to-government relations with federally recognized tribes. These responsibilities are established by treaty, reaffirmed by statute and cannot be delegated.

Specific Guidance

WVDOH, on behalf of FHWA and with the consent of the Indian tribes, will solicit interest in consultation, transmit project documentation and otherwise perform routine coordination with the tribes. FHWA at its discretion or through request of an Indian tribe may take over coordination at any time. A matrix identifying the relevant Indian tribes and notification procedures is located in Attachment A. It should be noted that tribal contacts change frequently; therefore, WVDOH, in consultation with FHWA, will update the list on an annual basis and updates to this guidance can be accessed online at the following website:

¹ Consulting party, as formally defined under 36 CFR Part 800.2 (C)(2)(ii). “*Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.* Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.”

<http://www.highwaysthroughhistory.com/>. This guidance and list has been included as an appendix to the 2016 Section 106 Programmatic Agreement and it will be incorporated into WVDOH Design Directive 202 and any respective Programming Division guidance.

Goals

The purpose of consultation with Indian tribes is on par with consultation with the State Historic Preservation Office (SHPO) or consultation with other interested parties, which is to reach an informed and supported decision on identifying, assessing effects, and consulting as to how to treat the effects of projects on historic properties. Where historic properties are of religious and cultural significance to Indian tribes, we expect that the Indian tribes will bring a unique and added perspective to the consultation process. When Indian tribes are provided with a reasonable opportunity to provide advice on the identification and evaluation of such properties, articulate views on the project's effects on such properties and participate in the resolution of adverse effects to such properties, better decisions and outcomes will result.

Initial Consultation

Consultation between WVDOH/FHWA and each Indian tribe is to be done in a manner that is sensitive and respectful of tribal sovereignty. In principle, consultation should begin early in a project's planning process so that all parties have ample time to identify and discuss relevant tribal historic preservation issues and resolve concerns about the confidentiality of information concerning historic properties of religious and cultural significance. The attached matrix (Attachment A) identifies the circumstances that trigger a particular tribe's interest, as well as the point in the project development process when the Indian tribe has requested to be notified of a project.

Program Level Consultation

Seven (7) Indian tribes have requested to receive a copy of the West Virginia Statewide Transportation Improvement Plan (STIP). WVDOH's Programming Division is responsible for ensuring the document is made available to interested tribes according to the matrix in Attachment A.

Project Level Consultation

Under the 2016 Section 106 Programmatic Agreement among FHWA, SHPO, the Advisory Council on Historic Preservation (ACHP), and WVDOH, FHWA has delegated its review of undertakings under Section 106 of the responsibilities the WVDOH. While FHWA retains its lead agency responsibility to consult with Indian tribes; however, this guidance outlines the process that will be followed by WVDOH's Engineering Division, in consultation with its cultural resource specialists and environmental project managers, to transmit project-level documentation to the Indian tribes, and to ensure that copies of the notification are provided to FHWA, to the attention of the environmental manager. Coordination with the Indian tribes will take place according to Attachment A. Not all Indian tribes require notification at the same stage in a project, so it is important to review the matrix in Attachment A at the start of a project. The Indian tribes will be given thirty (30) days to either accept or reject the invitation for continued participation in the project development. An example of a tribal contact letter can be found in Attachment B.

In almost all cases, based on coordination with Indian tribes with an interest in West Virginia, tribal interest is limited to archaeological resources of either the Pre-Contact or Contact periods. Consequently, only projects involving ground-disturbing activities in previously undisturbed areas are likely to be of interest. For Categorical Exclusion (CE)² level projects, notifications will only be sent if the initial archeological analysis results in the potential for encountering resources of religious or cultural significance to the tribes.

For larger projects requiring an Environmental Impact Statement (EIS)³, or Environmental Assessment (EA)⁴, initial notification to the Indian tribes should occur when WVDOH and FHWA initiate the agency and public scoping process. Materials to be transmitted should include a copy of the Notice of Intent, as well as any relevant summary materials. Indian tribes electing to participate in the project development process will be incorporated into the coordination plan for the project.

If multiple Indian tribes express interest in a project, it is possible that some Indian tribes may terminate consultation or designate a lead Indian tribe as new information, including the identification of archaeological sites, becomes available during the project development process.

Initial Consultation for Pre-Existing Projects

Projects that have begun prior to the issuing of this guidance can and should benefit from tribal consultation. Further, the fact that a project has begun does not alleviate FHWA's and WVDOH's responsibilities to consult. Within thirty (30) days of finalizing this guidance, WVDOH will ensure that coordination for existing projects will be done according to Attachment A.

Bringing tribal consultation into an ongoing Section 106 process should be dictated by a common-sense approach that emphasizes the potential value of that consultation, not only for the purposes of Section 106, but also for the National Environmental Policy Act (NEPA), and to some extent Environmental Justice. Attachment C lists the evolving steps in Section 106 and the appropriate response by WVDOH to initiate consultation.

Continuing Consultation

Once an Indian tribe has received notification of a project, WVDOH will continue to transmit relevant information, until the Indian tribe directs otherwise. Tribes may enter consultation on a project at any time, but even when not choosing not to participate actively, tribes still be provided project information at key decision points (i.e., identification of properties, determination of effect, and consultation to resolve any adverse effects) unless they specifically request not to receive information. Copies of all formal tribal coordination should be forwarded to FHWA. Informal consultation, including telephone conversations, on-site meetings, web sites, and e-mail is to be encouraged, and documented in the project file. At critical decision points and where decisions are documented, each consulting Indian tribe, SHPO and FHWA should all receive a copy of the documentation.

² Categorical Exclusions are projects that which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts, per 23 CFR Part 771.117(a).

³ Actions that significantly affect the environment, per 23 CFR Part 771.115(a)

⁴ Actions in which the significance of the environmental impact is not clearly identified, per 23 CFR Part 771.1159(c).

Attachment A

Nation Contact Matrix

Nation Contact Information	WV STIP	EA or EIS NEPA Document	Potential Impacts To Historic Properties of Religious or Cultural Significance	Discovery of Human Remains or Culturally Significant Items Identified Post NEPA
Seneca-Cayuga Tribe of Oklahoma 23701 S. 655 Road Grove, OK 74344 Contact: [REDACTED], Tribal Historic Preservation Officer	X	X	X	X
Seneca Nation of Indians 90 Ohi:yo' Way Salamanca, NY 14779 Contact: [REDACTED], Tribal Historic Preservation Officer	X	X	X	X
Eastern Shawnee Tribe of Oklahoma 10080 S. Bluejacket Road Wyandotte, OK 74370 Contact: [REDACTED], Tribal Historic Preservation Officer	X	X	X	X
Eastern Band of Cherokee Indians P.O. Box 455 Cherokee, NC 28719 Contact: [REDACTED], Tribal Historic Preservation Officer	X	X	X	X
Delaware Nation PO Box 825 Anadarko, OK 73005-0825 Contact: [REDACTED], Cultural Preservation Director	X	X	X	X

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Nation Contact Information	WV STIP	EA or EIS NEPA Document	Potential Impacts To Historic Properties of Religious or Cultural Significance	Discovery of Human Remains or Culturally Significant Items Identified Post NEPA
United Keetoowah Band of Cherokee Indians in Oklahoma P.O. Box 1245 Tahlequah, OK 74465 Contact: [REDACTED], Tribal Historic Preservation Officer	X	X	X	X – Only the following Counties: Boone, Cabell, Fayette, Kanawha, Lincoln, Logan, McDowell, Mason, Mercer, Mingo, Monroe, Putnam, Raleigh, Summers, Wayne and Wyoming
Osage Nation 627 Grandview Pawhuska, OK 74056 Contact: [REDACTED], Tribal Historic Preservation Officer	X	X	X	X – Only the following Counties: Brooke, Cabell, Doddridge, Hancock, Jackson, Lincoln, Marion, Marshall, Mason, Monongalia, Ohio, Pleasants, Putnam, Ritchie, Roane, Tyler, Wayne, Wetzel, Wirt and Wood
Oneida Indian Nation 2037 Dream Catcher Plaza Oneida, NY 13421 Contact: [REDACTED], Nation Representative				X
Shawnee Tribe P.O. Box 189 Miami, OK 74355 Contact: [REDACTED], Chief				X

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Nation Contact Information	WV STIP	EA or EIS NEPA Document	Potential Impacts To Historic Properties of Religious or Cultural Significance	Discovery of Human Remains or Culturally Significant Items Identified Post NEPA
Absentee-Shawnee Tribe of Oklahoma 2025 S. Gordon Cooper Drive Shawnee, OK 74801 Contact: [REDACTED] [REDACTED] Cultural Preservation Director				X
Cayuga Nation of New York P.O. Box 803 Seneca Falls, NY 13148 Contact: [REDACTED] [REDACTED], Federal Representative				X
Oneida Tribe of Indians of Wisconsin P.O. Box 365 Oneida, WI 54155 Contact: [REDACTED] [REDACTED] Tribal Historic Preservation Officer				X
Onondaga Nation of New York PO Box 319-B Nedrow, NY 13120 Contact: [REDACTED], Head Chief				X
Saint Regis Mohawk Tribe 412 State Route 37 Akwesasne, NY 13655 Contact: [REDACTED] [REDACTED], Tribal Historic Preservation Officer				X
Tonawanda Band of Seneca Indians of New York PO Box 795 Basom, NY 14013 Contact: [REDACTED], Chief				X
Tuscarora Nation 2006 Mount Hope Road Lewistown, NY 14092 Contact: [REDACTED], Chief				X

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Nation Contact Information	WV STIP	EA or EIS NEPA Document	Potential Impacts To Historic Properties of Religious or Cultural Significance	Discovery of Human Remains or Culturally Significant Items Identified Post NEPA
Cherokee Nation of Oklahoma P.O. Box 984 Tahlequah, OK 74465 Contact: [REDACTED] [REDACTED], Principal Chief				X
Tunica-Biloxi Indian Tribe of Louisiana P.O. Box 1589 Marksville, LA 71351 Contact: [REDACTED] [REDACTED] Tribal Historic Preservation Officer				X
Omaha Tribe of Nebraska P.O. Box 368 Macy, NE 68039 Contact: [REDACTED] [REDACTED], Tribal Historic Preservation Officer				X

August 5, 2016

Attachment B

Mr. or Ms. XXXXX

XXXXXXXXXXXXXXXXXX

XXXXXX, XXXXXX

Dear Mr. or Ms. XXXXX:

State Project XXXXXX
Federal Project XXXXXXXX

Project Name XXX

Summers County

In accordance with Section 106 of the National Historic Preservation Act, United States Department of Transportation Order 5301.1 and Executive Order 13175 the West Virginia Division of the Federal Highway Administration (FHWA) and West Virginia Department of Transportation (WVDOT) has identified your Nation as potentially having an interest in Federally funded highway projects undertaken in the state of West Virginia.

This purpose of this correspondence is to initiate consultation with your Nation per WVDOT's Tribal Consultation Guidance. WVDOT respectfully requests comments by XXXXX.

Should you have any questions, please contact XXXXX of the Environmental Services Section, at 304-558-XXXX.

Very truly yours,

Raymond J. Scites, P.E., Director
Engineering Division

Attachment C

Project has reached this Section 106 Stage:	Guidance
Scoping Field View	Provide a project description and project map and assessment of archaeological potential – continue to involve Indian tribes.
APE Established	Provide a project description, project map showing APE for archaeology, and assessment of archaeological potential – continue to involve Indian tribes.
Execution of project-specific Programmatic Agreement	Provide above documentation, a copy of the PA, and a written statement from FHWA that Tribes will be consulted on this project – continue to involve Indian tribes.
Identification of Historic Properties (archaeological sites)	Provide above documentation and Phase I and/ or II archaeological report (most likely draft) – continue to involve Indian tribes.
Determination of Eligibility of Historic Properties (archaeological sites)	Provide above documentation and Phase I and II archaeological report, and SHPO’s comments – continue to involve Indian tribes.
Determination of Effect	Provide above documentation and Phase I and II archaeological report, and SHPO and other consulting party comments – continue to involve Indian tribes.
Resolution of Adverse Effect	Provide project documentation relevant to adversely affected archaeological sites, including Phase I and II reports and proposed mitigation plans. Unless an MOA has been executed, involve Indian tribes in consultation to resolve Adverse Effects, which includes sharing draft MOA’s, and determining whether any Indian tribe(s) should be signatory or concurring party(ies).
Executed Memorandum of Agreement to Resolve an Adverse Effect	Provide project documentation relevant to adversely affected archaeological sites, including Phase I and II reports, and proposed mitigation plans, and a copy of the MOA. – continue to involve Indian tribes in the mitigation efforts, including progress reports and site visits.
Data Recovery Excavations or other mitigation completed	Provide NEPA document, relevant Phase I and II reports, including interim mitigation reports. – continue to involve Indian tribes in review of reports.
Draft Report Completed	Provide NEPA document, relevant Phase I and II reports, including interim mitigation reports. – seek Tribal comment in review of reports.
Final Report Completed	Provide NEPA document, relevant Phase I and II reports, and copy of Final Report for any final report completed.