

OCT 15 2007

Environmental
Quality

MEMORANDUM OF UNDERSTANDING
AMONG THE
PENNSYLVANIA DIVISION OF THE FEDERAL HIGHWAY ADMINISTRATION,
and the SHAWNEE TRIBE,
REGARDING Tribal Consultation

WHEREAS, the Federal Highway Administration (FHWA) is the Federal agency with statutory responsibilities for administering the Federal-Aid highway program under Title 23 U.S.C. "Highways" and agrees to coordinate under a government-to-government relationship with Federally recognized tribal governments in carrying out its activities under Title 23 and other applicable Federal statutes;

WHEREAS, the Shawnee Tribe is acknowledged by the Federal Government with a government-to-government relationship with the United States;

WHEREAS, the FHWA recognizes that the Shawnee Tribe includes the descendents of the one-time aboriginal inhabitants of Pennsylvania and has an affiliation with certain historic properties in the state, including some with religious or cultural significance;

WHEREAS, the FHWA has requested the Pennsylvania Department of Transportation (PennDOT), the primary recipient of Federal-Aid highway funds in the State of Pennsylvania, to provide assistance to FHWA in complying with the body of environmental law that includes the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and other similar laws;

WHEREAS, the FHWA: 1) has determined that certain transportation projects constitute "undertakings" which may have an effect upon properties included in, or eligible for inclusion in, the National Register of Historic Places (NRHP); 2) intends to integrate its consideration of historic properties and management decisions with other policy and program requirements (such as those of NEPA) to the maximum extent possible, consistent with Section 106 of NHPA;

WHEREAS, 36 CFR Part 800 encourages Federal agencies to efficiently fulfill their responsibilities under NHPA through the development and implementation of cooperative programmatic agreements;

WHEREAS, representatives of the FHWA have engaged in consultation with representatives of the Shawnee Tribe to establish a consultation process;

WHEREAS, the FHWA and the Shawnee Tribe have jointly agreed to establish a programmatic consultation process;

WHEREAS, the FHWA and the Shawnee Tribe acknowledge that most Federal-Aid undertakings in Pennsylvania have no impacts to properties that have cultural or religious

significance and wish to concentrate their consultation on those undertakings that may have such impacts;

WHEREAS, the FHWA recognize that the Shawnee Tribe is committed to protecting properties of traditional religious, historical, and cultural significance to the tribe;

WHEREAS, the stipulations of this agreement are intended to recognize and accommodate all existing Section 106 programmatic agreements currently in effect in Pennsylvania between the FHWA, PennDOT, and the SHPO as listed in Attachment 1;

WHEREAS, PennDOT has a staff of Cultural Resource Professionals (CRPs) who meet the Secretary of Interior's Professional Qualification standards as identified in 36 CFR 61 in the fields of archaeology, history, archaeological collections management and architectural history to carry out its historic preservation programs and responsibilities;

WHEREAS, PennDOT has participated in the consultation and has been invited to sign this programmatic agreement;

WHEREAS, nothing in this agreement is intended to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights, or other such rights of the Shawnee Tribe, or to preempt, modify, or limit the exercise of any such rights.

NOW, THEREFORE, the FHWA, the Shawnee Tribe, and PennDOT agree that the implementation of Federal-Aid highway projects shall be administered in accordance with the following stipulations in order to satisfy FHWA's responsibilities with regard to consultation with the Shawnee Tribe for individual undertakings of the program.

ADMINISTRATIVE CONDITIONS

1. Applicability.

This agreement sets forth the process by which FHWA, with assistance by PennDOT, will meet its responsibilities to consult with the Shawnee Tribe consistent with applicable laws and regulations.

This Agreement applies to all Federal-Aid highway program undertakings in the geographic area of interest to the Shawnee Tribe as delineated in Attachment 2.

2. Government-to-Government Relations

PennDOT, on behalf of FHWA, will solicit comments from the Shawnee Tribe for undertakings that may affect properties of traditional religious, historical, and cultural significance to the tribe. FHWA shall retain the ultimate responsibility for complying with all Federal requirements pertaining to direct government-to-government consultation with the Tribe. Notwithstanding any other provision of this agreement, FHWA shall honor the request of any Federally Recognized tribe for direct government-to-government consultation regarding an undertaking covered by this agreement.

3. Maintenance of Cultural Resource Professional Staff

PennDOT shall maintain Cultural Resource Professionals (CRPs) – either as permanent employees or consultants - who meet the National Park Service’s Professional Qualifications Standards, whose duties shall include implementing this agreement, and who receive training on these duties such as the completion of an appropriate National Highway Institute (NHI) course or the equivalent.

4. Dispute Resolution.

Should any party to this agreement object in writing to FHWA regarding any action carried out or proposed with respect to a particular undertaking or implementation of this agreement, FHWA shall consult with the objecting party to resolve the objection. If after initiating such consultation FHWA determines that the objection cannot be resolved through consultation, FHWA shall consult with all parties (unless the information is identified as confidential to the tribe). After consultation with other parties, FHWA shall make a decision and forward all documentation to all parties. If objection is relative to Section 106 consultation, FHWA shall forward all documentation relevant to the objection to the Council pursuant to 36 CFR 800.6(b), including FHWA’s proposed response to the objection.

FHWA’s responsibility to carry out all actions under this agreement that are not the subjects of the objection shall remain unchanged.

5. Amendment

The Shawnee Tribe may propose modifications to this agreement through a justification letter signed by the Tribe’s primary contact and a representative of the Tribe’s government.

The FHWA may propose modifications to this agreement through a justification letter to the other parties. Other parties may also propose modifications to this agreement through the FHWA by writing a justification letter.

6. Review and Duration

This agreement becomes effective when fully executed by all parties hereto and shall remain in effect for five (5) years unless prior to that date FHWA and the Shawnee Tribe agree in writing to extend it for an additional agreed upon term.

FHWA shall conduct a review of this agreement within two (2) years of its full execution and, if the agreement is extended, also two (2) years thereafter. The Shawnee Tribe and PennDOT shall be invited to participate in the review(s).

7. Termination

Any party to this agreement may terminate it by providing thirty (30) days’ written notice to the FHWA, provided that the parties will consult as described in “Dispute Resolution” above during the period prior to the termination to seek agreement on amendments or other actions that would avoid termination. In the event of

termination, the FHWA will assume responsibility for all activities associated with tribal consultation on a project by project basis.

STIPULATIONS

1. Points of Contact.

- A. All points of contact are described in Attachment 3.
- B. The point of contact for correspondence to the Pennsylvania Division FHWA shall be the Division Administrator. Project-related information can be addressed to the attention of the appropriate Environmental Specialist. Policy and overarching issues can be addressed to the attention of the Tribal Coordinator. See Attachment 3 for contact information.
- C. The point of contact for correspondence to PennDOT shall be the appropriate CRP assigned to the District in which the project is located, and/or the Cultural Resources Management Program Group Leader. See Attachment 3 for contact information.
- D. The primary point of contact for correspondence to the Shawnee Tribe is described in Attachment 3.
- E. Each party shall notify the other parties within thirty (30) days of any changes to the point of contact. Such changes shall not require amendment of this agreement.

2. Conditions of Notification.

As a result of ongoing discussions between the FHWA, the Shawnee Tribe, and PennDOT the participating parties agree that PennDOT will notify the tribe of projects falling within their geographic area of interest according to the conditions listed in Attachment 4.

The Shawnee Tribe will be notified within twenty-four (24) hours of the discovery of any human remains or related items which fall within the Tribe's counties of interest and are not judged by the coroner to be recent as outlined below in "Respectful Treatment". Notification shall be consistent with Attachment 5.

3. Consultation Activities.

Consistent with the notification conditions described in Attachment 4, project information including a description of the undertaking, location information, and status in regards to archaeological potential shall be provided so that the Tribe has a reasonable opportunity to identify its concerns about historic properties, advise on the identification

and evaluation of historic properties, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.

The Shawnee Tribe will respond to requests for information or consultation within thirty (30) days of receipt of the information with either a project response or with a notification of when a project response will be forthcoming. If PennDOT does not receive a response from the Tribe within thirty (30) days of the submission of the request for information, FHWA and PennDOT will assume that the Tribe concurs with the consultation information at this time.

PennDOT will make a reasonable attempt to incorporate any information or comments received after thirty (30) days as the project allows.

4. Unanticipated Discovery/Late Discovery.

If previously unidentified cultural material is discovered during construction of an undertaking, that portion of the project will stop immediately. PennDOT's appropriate CRP will make a preliminary assessment of integrity and, if appropriate, a determination of eligibility. If preliminarily determined eligible for the NRHP, the CRP will immediately contact any Federally recognized tribes consistent with any existing project-specific agreements, depending on whether the site falls within their geographic area of interest.

If the site is preliminarily determined eligible, earth disturbing activities will cease in that portion of the construction project until the requirements of 36 CFR 800.13 have been satisfied. FHWA and PennDOT's appropriate CRP will consult with all Federally recognized tribes with affiliations to the area, including the Shawnee Tribe, to assess the National Register eligibility of the site, and if determined eligible, assess the project's effect on the site. If the site is eligible and the project will have an adverse effect, the FHWA and PennDOT will consult in an expedited manner, with all Federally recognized tribes with affiliations to the area to identify opportunities to avoid, minimizing, or mitigate adverse effects on the site.

If preliminarily determined not eligible for the NRHP, the FHWA and PennDOT will notify any Federally recognized tribes consistent with any existing project-specific agreements, depending on whether the site falls within their geographic area of interest.

5. Respectful Treatment

If human remains and/or grave-associated artifacts are discovered at any time during an undertaking, the remains and grave-associated artifacts will be secured as found and protected by PennDOT.

The appropriate PennDOT CRP shall notify the local coroner to verify that the remains are human and shall seek the coroner's concurrence that the remains are not recent. Within twenty-four (24) hours of discovery, PennDOT shall notify the FHWA who shall in turn notify the Council and Federally-Recognized tribes with affiliations to

the area, including the Shawnee Tribe, according to the contact list provided in Attachment 5.

At the discretion of FHWA, all parties shall be given the opportunity to meet at the location of the find within seventy-two (72) hours of discovery. No activities that might disturb or damage the remains will be conducted until the FHWA, in consultation with all parties, has determined whether excavation is necessary and/or desirable.

All procedures will consider the guidance outlined in the National Park Service publication *National Register Bulletin 41: Guidelines for Evaluating and Registering Cemeteries and Burial Places*, and consider the Native American Graves Protection and Repatriation Act of 1990 (PL 101-601) as appropriate, and the Pennsylvania Historical and Museum Commission's *Policy for the Treatment of Burials and Human Remains (1993)*, and the Commonwealth of Pennsylvania's Law on unmarked graves (see Attachment 6).

If remains are encountered, that portion of the project area will be made inaccessible to the public and all non-essential personnel. If the FHWA determines that the remains are possibly Native American in origin, no photographs or drawings shall be taken of the remains and/or grave-associated artifacts other than determined necessary by the FHWA in consultation with all consulting Federally Recognized Tribes and the SHPO. Mapping of the site is permitted. No information about the remains and/or artifacts shall be released to the public prior to consultation among FHWA, PennDOT, the Shawnee Tribe, and other interested parties. The FHWA will determine the appropriate treatment of the remains and/or grave-associated artifacts through consultation with the Shawnee Tribe, PennDOT and other interested parties and carried out as soon as reasonably possible.

As requested by the Shawnee Tribe, once remains are found within their geographic area of interest a reasonable effort will be made to ensure the following:

1. All project activity in the vicinity of the remains and/or grave-associated artifacts shall stop immediately. Human remains will not be touched, removed or handled except as necessary by the coroner.
2. The Shawnee Tribe's primary contact shall be notified within twenty-four (24) hours of discovery. If the primary contact is unavailable, the next points of contact shall be as listed in Attachment 5.

Execution of this MOU by the FHWA and the Shawnee Tribe and the implementation of its terms, documents the efforts of the Pennsylvania Division of FHWA to consult with the Shawnee Tribe under Federal law and regulations.

FEDERAL HIGHWAY ADMINISTRATION

By: James A. Cleathan Date: 12/6/06

SHAWNEE TRIBE

By: *Ron Sparkman* Date: 10-2-2007
Ron Sparkman, Chairman

CONCUR:

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

By: *M. L. Bates* Date: 10/11/06

Approved as to Legality and Form

BY Michael H. Hine 10.18.06
for Chief Counsel Date

*for
Hine*
BY [Signature] 0.26.06
Deputy General Counsel Date

BY Amy M. Elliott 11/20/06
Deputy Attorney General Date