

OS-600
PENNSYLVANIA
TRANSPORTATION

COMMONWEALTH OF
DEPARTMENT OF

DATE:

SUBJECT: Interim guidance on consulting with Indian Tribes

TO: District Engineers and District Administrator

FROM: R. Scott Christie, PE
Acting Director
Bureau of Design

This Strike Off Letter provides guidance as to Consultation with Native American Tribes. The 1992 amendments to the National Historic Preservation Act, and changes made in 1999 to the implementing regulations (36 CFR Part 800) of Section 106 of that Act (and made effective January 11, 2001), obligate federal agencies to work more closely with Native American Tribes in reaching decisions. As a federal agency, the Federal Highway Administration (FHWA), and by extension this Department, 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. These historic properties may be located on tribal lands. Pennsylvania has no current tribal lands, but historic properties may also be located on ancestral, aboriginal or ceded lands affected by Department projects. The purpose of this interim guidance is to advise Engineering Districts and project managers how best to approach tribal consultation. As has been demonstrated in other states, developing a good working relationship with Tribes takes time. This guidance will undergo a refinement over the next few years; however, a general approach has been worked out, and steps that point the Department in the right direction are warranted.

At this time, a total of 14 Federally recognized Tribes have been identified that are likely to have an interest in Pennsylvania projects. Federal recognition is a key component of 36 CFR Part 800. A list of federally recognized Tribes is maintained at the Bureau of Indian Affairs web site: www.doi.gov/bureau-indian-affairs¹. However, this information can also be found at other sites, including <http://www.artnatam.com/tribes.html> and on the PENNDOT Shared Drive, under ***PENNDOT Shared/BEQ/Cultural Resources/Tribal Consultation/FHWA CD/***. Federally recognized Tribes have special status as a consulting party² 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 Tribes. These responsibilities are established by treaty and cannot be delegated. Tribes that are

¹ As of this date, the Department of the Interior Web Site is unavailable, due to a Federal lawsuit with the Bureau of Indian Affairs.

² 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.”

not Federally recognized may also participate in the Section 106 process; however, their status is equivalent to other interested parties. (Please note that each reference to “tribe” below is to a federally recognized Indian tribe, as defined in 36 CFR Part 800, unless otherwise noted.)

In the long-term, FHWA and the Department hope to reach specific protocols, or understandings, with each of the Tribes that would outline the procedures used to fulfill our obligation to consult. Reaching that specificity will involve ongoing discussions with each of the Tribes, and may include a summit in 2003. It is important to note that the foundation for these protocols needs to be trust and good communication, which cannot be forced or rushed.

Specific Guidance

In the short-term, the Department has been delegated activities on behalf of FHWA and with the consent of the Tribes, to begin consultation with Tribes and to transmit documentation and otherwise coordinate with the Tribes. Two forms are attached to facilitate that coordination: a PENNDOT Project Initial Tribal Notification Form, and a PENNDOT Project Information Form.

A matrix identifying relevant Tribes, notification procedures, tribal concerns, and tribal contact is provided for each Engineering District, along with a map identifying approximate boundaries for each tribe’s geographic interest. A set of 200 mailing labels and an electronic copy of the tribal contact list is also being provided to each Engineering District. The tribal contact list also includes the names of tribal officials to be copied during the consultation process. The Department, in consultation with FHWA, will update the list on an ongoing basis. It should be noted that tribal contacts change frequently

Goals

The purpose of consultation with Tribes is no different from consultation with the SHPO or consultation with other interested parties. That purpose is to reach an informed and supported decision on how to treat the effects of projects on historic properties. Where historic properties are of religious and cultural significance to Tribes, we expect that the Tribes bring a unique and added perspective to the consultation process. When Tribes are provided with a reasonable opportunity to provide advice on the identification and evaluation of such properties, when Tribes articulate views on the project’s effects on such properties, and when Tribes participate in the resolution of adverse effects to such properties, the decisions and results will be better.

Initial Consultation

Consultation between the Department and each 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

historic preservation issues and resolve concerns about the confidentiality of information *concerning historic properties of religious and cultural significance to tribes* (our emphasis).

The attached matrix identifies which circumstances trigger a Tribe's interest and at what point a Tribe would want to be notified of a project. In almost all cases, 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. In general, notification to the Tribes for Categorical Exclusion (CE)-level projects³ should occur shortly after the project scoping, so that archaeological potential can be summarized.

For larger Environmental Impact Statement (EIS)-level projects⁴, initial notification to the Tribes should occur during Step 2 of PENNDOT's ten-step process (Publication 278), after the publication of the Notice of Intent, but before the project's introduction at ACM. Materials to be transmitted should include a copy of the Notice of Intent, as well as summary materials that have been prepared for ACM. In the initial notification, a statement should be added that informs the Tribes that subsequent notification will occur during Step 4 or Step 5, certainly by the time that an archaeological predictive model would have been developed and expected to be used to either dismiss alternatives (Step 4) or as part of the detailed engineering and environmental analyses (Step 5). The predictive model should be presented to the Tribes at the same time it is presented to other agencies, such as the SHPO.

For Environmental Assessment (EA)-level projects⁵, initial notification would take place during Step 2 at the conclusion of the scoping field view. Subsequent notification would occur during Step 3 identification efforts, or during the development of any archaeological predictive modeling.

Some of the Tribes, such as the Oneida Indian Nation or the Seneca Nation of Indians, have geographically proscribed areas of interest. In the future, these are expected to be provided in maps of Pennsylvania, demarcated for these Tribes. Other Tribes, such as the Eastern Shawnee Tribe of Oklahoma, lived in all parts of Pennsylvania, and no map would be useful. However, the Eastern Shawnee Tribe of Oklahoma and the Absentee-Shawnee Tribe of Oklahoma occupied Pennsylvania during a defined period of time. In cases where more than one Tribe could have occupied a project area, notification should be to all of these Tribes. As the project advances and as archaeological sites are identified and associated with specific cultures, we expect that some of the Tribes would end consultation or that one of the Tribes would be designated as lead tribe by those Tribes already notified.

³ 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).

⁴ Actions that significantly affect the environment, per 23 CFR Part 771.115(a)

⁵ Actions in which the significance of the environmental impact is not clearly established, per 23 CFR Part 771.1159(c).

It is the responsibility of the District qualified professional archaeologist to transmit documentation to the Tribes, and to ensure that copies of the notification are provided to both FHWA, attention the environmental review team member, and the Bureau of Design Environmental Quality Assurance Division, attention Susan McDonald. Follow the matrix to identify the point at which a tribe should be notified. Not all Tribes will be requesting notification at the same stage in a project, so it is important to check each tribe's notification interest at the start of a project. Use the PENNDOT Project Initial Tribal Notification Form to begin consultation, attaching a Scoping Field View Project Description Form. The Department contact should be the Department qualified professional archaeologist that covers the District in which the project is located. Tribal contact information should be pre-printed on the Form for each tribe contacted. The back of the form can be *self-addressed* to the attention of the Department qualified professional archaeologist and *stamped* to ensure a timely response, or, a self-addressed, stamped envelope can be enclosed.

Initial Consultation for Pre-Existing Projects

Projects that have begun prior to the issuing of this interim guidance can and should still benefit from tribal consultation, and the fact that a project has begun does not alleviate FHWA's and the Department's responsibilities to consult. Changes to the National Historic Preservation Act were made in 1992, and both regulations and other Federal Directives have been in place for two or more years.

When tribal notification comes after studies have begun, both the PENNDOT Project Initial Tribal Notification Form and the PENNDOT Project Information Form should be used. The Initial Notification Form should contain the project description, while the Information Form should contain any documentation or information to be provided at this stage of study. Copies of the PENNDOT Project Initial Tribal Notification Form and attachments should be provided to both FHWA and the Bureau of Design Environmental Quality Assurance Division, attention Susan McDonald.

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. Table 1 lists the evolving steps in Section 106 and the appropriate response by the Department to initiate consultation.

Continuing Consultation

Once a Tribe has received notification of a project, the Department will continue to transmit relevant information to the Tribe, until the Tribe directs otherwise. Tribes may choose to be a consulting party on a project at any time, but even when not choosing to be a consulting party, may still request project information. Copies of Tribal responses requesting to be consulting parties should be forwarded to both the Bureau of Design Environmental Quality

Assurance Division and the 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 Tribe should receive a copy of that documentation, like the SHPO and FHWA. Each document transmittal must have the PENNDOT Project Information Form (attached) as it's cover, and should contain a one-page synopsis of the material being transmitted.

CD-ROM Handbook reference

FHWA has prepared a CD-ROM collecting information on tribal consultation from both a national perspective and some state examples. Existing legislation and Executive Orders are available in folders, along with some specific guidance, reference materials, and maps. The CD-ROM files are currently available in the PennDOT Shared Drive, under the BEQ/Cultural Resources/Tribal Consultation folder.

Future Steps

FHWA has sent letters to each of the 14 Tribes to confirm its delegation of routine matters to the Department and to confirm the conditions and timing of projects of interest. In the near future, the Department will be providing a series of documents to all 14 Tribes, including:

- PENNDOT's 12-year Plan

- Copies of the Minor Projects Programmatic Agreement and Operating Procedures

- Copies of the Minor Projects Programmatic Agreement Annual Reports for years 1997 through current

- A list of current and ongoing Phase III archaeological projects

Because this guidance is interim, the Department, in consultation with FHWA and the Tribes, will be revising and updating these procedures. In particular, the Department expects a further refinement of the geographic boundaries of each tribe's interests, as well as a refinement of the types of projects and conditions that would trigger consultation. Input from the Engineering Districts will be crucial to ensure this guidance meets both the letter and spirit of the law and implementing regulations. Please direct your comments to Susan L. McDonald, Chief of the Environmental Quality Assurance Division, at 717-787-1024.

4300/ICB/jh
772-0830

Cc: D. A. Schreiber, P.E., Acting Chief Engineer
All Highway Administration Bureau Directors
All District Environmental Managers
D. Spila, KB 8, PO
S. L. McDonald, KB 7, BOD
B. D. Hare, P.E., KB 7, BOD
C. J. Campbell, KB 7, BOD
M. D. Lombard, KB 7, BOD
I. C. Beckerman, R.P.A., KB 7, BOD
K. Vandervoort, FHWA
J. H. Cutler, PHMC
Bureau of Office Services, Sales Store and
Paperwork Management Unit, KB 5
Consulting Engineers Council of PA
2040 Linglestown Rd., Suite 200
Harrisburg, PA 17110
Attn: John VanNatta

Table 1

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 Tribes
APE Established	Provide a project description, project map showing APE for archaeology, and assessment of archaeological potential – continue to involve 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 Tribes
Identification of historic properties (archaeological sites)	Provide above documentation and Phase I and/ or II archaeological report (most likely draft) – continue to involve 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 Tribes
Determination of Effect	Provide above documentation and Phase I and II archaeological report, and SHPO and other consulting party comments – continue to involve Tribes
Minor Projects Programmatic Agreement Findings D.2 and D.3	Provide copies of the D.2 or D.3 Finding and Phase I and II archaeological report, and SHPO and other consulting party comments – continue to involve 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 Tribes in consultation to resolve Adverse Effects, which includes sharing draft MOA’s, and determining whether any Tribe(s) should be signatory or concurring party(ies)
Executed Memorandum Of Agreement to resolve 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 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 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 in 2002 or 2003.

PENNDOT Project Initial Tribal Notification Form

(for PENNDOT use only)

Date: _____ **ER#:** _____ **SR#:** _____ **Section#:** _____ **MPMS#** _____

County: _____ **Contact Name:** _____

Telephone: () _____ **Fax:** () _____ **Email:** _____

Brief Project Description (e.g. adding lanes, bridge replacement):

(see attached Scoping Field View Project Description form)

Project Type

- | | |
|---|---|
| <input type="checkbox"/> Minor Transportation (Categorical Exclusion) | <input type="checkbox"/> Environmental Impact Statement (EIS) |
| <input type="checkbox"/> Other Categorical Exclusion | <input type="checkbox"/> _____ |
| <input type="checkbox"/> Environmental Assessment (EA) | |

Archaeological Potential (pre-Contact or Contact Period sites)

- | | |
|--|--|
| <input type="checkbox"/> Known pre-Contact Period sites in project area | <input type="checkbox"/> Unlikely to find pre-Contact Period sites in project area |
| <input type="checkbox"/> Known Contact Period sites in project area | <input type="checkbox"/> Unlikely to find Contact Period sites in project area |
| <input type="checkbox"/> Likely to find pre-Contact Period sites in project area | <input type="checkbox"/> No expected ground disturbance |
| <input type="checkbox"/> Likely to find Contact Period sites in project area | <input type="checkbox"/> Other _____ |

Comments

Tribal Response

(for tribal use only)

Tribal contact for this project:

Tribe:
Name:
Address: _____ *(pre-printed)*
City, State, Zip:
Telephone: () _____
Fax: () _____
Email:
Copies to:

Note: If any of the information to the left is incorrect, please provide those changes to the Department contact above, or, to:

Ira Beckerman
Cultural Resources Section Chief
PENNDOT Bureau of Design
P.O. Box 3790
Harrisburg, PA 17105-3790
ibeckerman@state.pa.us

Do you wish to be a consulting party on this project? Yes No Not Sure

If you do not wish to be a consulting party, do you wish to continue to be involved in the development of the project? Yes No Not Sure

Note: If your answer is "Not Sure," PENNDOT will continue to provide information.

Do you wish to inform PENNDOT of any traditional religious and culturally important places in or near the project area? [information to be kept confidential]] Yes] No

If yes, please inform PENNDOT how to proceed to address the tribe's concerns:

Name of person completing this form, if different from above (please print):

Date: _____

Signature: _____

PENNDOT Project Information Form

(for PENNDOT use only)

Date: _____ **ER#:** _____ **SR#:** _____ **Section#:** _____ **MPMS#** _____

County: _____ **Contact Name:** _____

Telephone: () **Fax:** () **Email:** _____

Brief Project Description (e.g. adding lanes, bridge replacement):

(if this is the Initial Notification, provide the Initial Notification Form along with Scoping Field View Project Description form)

Project Status

- | | |
|---|--|
| <input type="checkbox"/> Initial Notification | <input type="checkbox"/> Determination of Effects |
| <input type="checkbox"/> Early Coordination | <input type="checkbox"/> Resolution of Adverse Effects (Phase III) |
| Date of Initial Notification: _____ | <input type="checkbox"/> Execution of Memorandum of Agreement |
| <input type="checkbox"/> Archaeological and Historic Resources identified | <input type="checkbox"/> Conducting Mitigation |
| <input type="checkbox"/> Determination of Eligibility (Phase II) | <input type="checkbox"/> Other: _____ |

Enclosure(s)

Documents/Information enclosed:

Comments

Tribal Response

(for tribal use only)

Tribal contact for this project:

Tribe: _____
Name: _____
Address: _____ *(pre-printed)*
City, State, Zip: _____
Telephone: () _____
Fax: () _____
Email: _____
Copies to: _____

Note: If any of the information to the left is incorrect, please provide those changes to the Department contact above, or, to:
Ira Beckerman
Cultural Resources Section Chief
PENNDOT Bureau of Design
P.O. Box 3790
Harrisburg, PA 17105-3790
ibeckerman@state.pa.us

Do you wish to be a consulting party on this project? Yes No Not Sure

If you do not wish to be a consulting party, do you wish to continue to be involved in the development of this project? Yes No Not Sure

Note: If your answer is "Not Sure," PENNDOT will continue to provide information.

Document Comments

Do you agree with the findings of eligibility or effect? (check one)] Yes] No
If no, please comment: _____

Do you wish to inform PENNDOT of any traditional religious and culturally important places in or near the project area? [to be kept confidential]] Yes] No

Do you have any other concerns?] Yes] No
If yes, please inform PENNDOT how to proceed to address your concerns: (add pages if necessary) _____

Name of person completing this form, if different from above (please print): _____

Signature: _____ Date: _____

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Tribe	Absentee- Shawnee Tribe of Oklahoma	Cayuga Nation	Delaware Nation, Oklahoma
Geographic Area	Statewide	Vicinity of Susquehanna River, West Branch	Eastern Pennsylvania
Notification Conditions	Ground-disturbing activities in previously undisturbed areas.	Ground-disturbing activities in previously undisturbed areas.	Ground-disturbing activities in previously undisturbed areas.
Notification Timing	Early upon initial scoping of projects	Early in the planning process	Early upon initial scoping of projects
Tribal Concerns	Not Available	*Would like to meet with FHWA to work on consultation procedures *Access to archaeological info. Regarding site locations etc.	Do not send information on projects that aren't ground disturbing
Current Project Interest	Not Available	Not Available	*Mon/Fayette Project (consulting party) *51 to Pittsburgh – requested field survey (surface and subsurface) for preferred alternative *Route 15 – request for a archaeological field survey *SR 0412 – would like more details, would like to see a Phase 1 or 2
Tribal Contact for Section 106	See Latest Update	See Latest Update	See Latest Update

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Tribe	Delaware Tribe of Indians, Oklahoma	Eastern Shawnee Tribe of Oklahoma	Oneida Indian Nation
Geographic Area	Eastern Pennsylvania	Statewide	Main Br. of Susquehanna River-Middle Reaches to NY Border: Bradford, Wyoming, Luzerne, Columbia, Northumberland, Montour, Snyder Counties
Notification Conditions	Ground-disturbing activities in previously undisturbed areas.	Ground-disturbing activities in previously undisturbed areas.	Want to receive reports and information concerning archaeological resources
Notification Timing	Early upon initial scoping of projects	Early upon initial scoping of projects	Not Available
Tribal Concerns	Not Available	Would like to deal with both DOT and FHWA	*Too much info. Sent *Can only be involved as an interested party
Current Project Interest	*Route 15 – working with Delaware Nation	Not Available	Not Available
Tribal Contact for Section 106	See Latest Update	See Latest Update	See Latest Update

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Tribe	Oneida Tribe of Indians of Wisconsin	Onondaga Indian Nation	Seneca Nation of Indians
Geographic Area	Statewide	Eastern and Northeastern Pennsylvania	Northwestern Pennsylvania
Notification Conditions	Ground-disturbing activities on major and minor projects.	*All ground disturbing activities in pristine areas (previously undisturbed)	*All ground disturbing activities in pristine areas (previously undisturbed) *Especially sites near rivers
Notification Timing	When final alternative has been selected (for large projects); when APE has been established for small projects.	Not Available	Early upon initial scoping of projects
Tribal Concerns	Would like to continue to be part of the consultation process	Would like to meet to further define the notification guidelines	Exchange of site file info. For specific projects in PA, want to make sure they have copies
Current Project Interest	Not Available	CSVT Project – interested in archaeological materials	Not Available
Tribal Contact for Section 106	See Latest Update	See Latest Update	See Latest Update

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Tribe	Seneca-Cayuga Tribe of Oklahoma	St. Regis Mohawk Tribe	Shawnee Tribe of Oklahoma	Stockbridge - Munsee Community of Mohican Indians of Wisconsin
Geographic Area	Not available	Not available	Not available	Not available
Notification Conditions	*All ground disturbing activities in pristine areas (previously undisturbed)	*All ground disturbing activities in pristine areas (previously undisturbed)	Not available	*All ground disturbing activities in pristine areas (previously undisturbed)
Notification Timing	Not Available	Not Available	Not available	Early upon initial scoping of projects
Tribal Concerns	Not Available	Not to disturb any human remains or properties that are sacred	Not available	*Do not send reports unless there are issues they are concerned with *Send a summary first to see if they are interested
Current Project Interest	Not Available	Not Available	Not available	Not Available
Tribal Contact for Section 106	See Latest Update	See Latest Update	See Latest Update	See Latest Update

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Tribe	Tonawanda Seneca Nation	Tuscarora Nation
Geographic Area	Not available	Central and Western Pennsylvania
Notification Conditions	*All ground disturbing activities in pristine areas (previously undisturbed)	Simple description at beginning of projects
Notification Timing	Not Available	Not Available
Tribal Concerns	Not Available	Not Available
Current Project Interest	Not Available	Not Available
Tribal Contact for Section 106	See Latest Update	See Latest Update

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Tribe	Absentee-Shawnee Tribe of Oklahoma	Cayuga Nation	Delaware Nation, Oklahoma	Delaware Tribe of Indians, Oklahoma
Potential for Programmatic Agreements	Yes, only if government to government, face to face meeting with federal officials	Yes, would like to be sent an example	Yes	Yes, but don't want any restrictions
Tribal Contact for Government-to-Government Relations*	See Latest Update	See Latest Update	See Latest Update	See Latest Update

Tribe	Eastern Shawnee Tribe of Oklahoma	Oneida Indian Nation	Oneida Tribe of Indians of Wisconsin	Onondaga Indian Nation
Potential for Programmatic Agreements	Yes, for very small projects	Yes	Yes, for projects that do not include ground disturbance	Yes
Tribal Contact for Government-to-Government Relations*	See Latest Update	See Latest Update	See Latest Update	See Latest Update

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Tribe	Seneca Nation of Indians	Seneca-Cayuga Tribe of Oklahoma	St. Regis Mohawk Tribe
Potential for Programmatic Agreements	Yes	Yes	Yes
Tribal Contact for Government-to-Government Relations*	See Latest Update	See Latest Update	See Latest Update

Tribe	Shawnee Tribe of Oklahoma	Stockbridge-Munsee Community of Mohican Indians of Wisconsin	Tonawanda Seneca Nation	Tuscarora Nation
Potential for Programmatic Agreements	Unknown	Yes	Yes, currently looking at examples put forth by other states	Yes, but want to be involved
Tribal Contact for Government-to-Government Relations*	See Latest Update	See Latest Update	See Latest Update	See Latest Update

* Unless otherwise instructed by the Tribe or FHWA, correspondence will be submitted to Tribes under FHWA cover.

Project Managers are responsible for transmittal of NEPA Documents to FHWA for transmittal to the Tribes.