



Guide to Tribal Nations - FHWA – ODOT Consultation in Ohio

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#### List of Terms:

ACHP	Advisory Council on Historic Preservation
APE	Area of potential effect
DOT(s)	Department of Transportation, referring to a state agency (see USDOT below)
FHWA	Federal Highway Administration
NAGPRA	Native American Graves Protection and Repatriation Act
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NRHP	National Register of Historic Places
ODOT	Ohio Department of Transportation
ODOT-OES	ODOT's Office of Environmental Services
SHPO/OSHPO	State Historic Preservation Office (OSHPO - Ohio SHPO), OSHPO is the Ohio SHPO. The OSHPO is part of the Ohio History Connection.
Section 106	Section of NHPA that describes consultation requirements
THPO	Tribal Historic Preservation Office
Tribe(s)	Refers specifically to federally recognized Indian tribes with ancestral, cultural, and historic ties to Ohio.
USDOT	United States Department of Transportation

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<sup>1</sup> Unless otherwise noted, members participated throughout 2019–2022.

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## PURPOSE

This document serves as guide for tribal and transportation cultural resources staff describing the Federal Highway Administration's (FHWA) current and future consultation responsibilities and protocols with the federally recognized Indian tribes<sup>2</sup> (Tribes) with ancestral, historical, and cultural ties to Ohio. The following sections will include background information on the Tribes, their sovereignty, and their relationships with the U.S. government; the meaning and process of consultation; government-to-government responsibilities between the Tribes and FHWA; and Ohio Federal-aid transportation consultation protocols.

A federally recognized tribe is an American Indian or Alaska Native tribal entity that is recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation. Furthermore, federally recognized tribes possess certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States.

Consultation is an integral aspect of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA), which require Federal officials to "...‘stop, look, and listen’ before making decisions that impact historic properties and the human environment.”<sup>3</sup> When a state uses Federal-Aid Highway funding, needs Federal approval for a project, or it involves a Federally owned property, it becomes subject to federal requirements, including an environmental review established under NEPA and Executive Orders (EOs) 13274 and 12372 (Exhibit B).

Under Section 106 of the NHPA, FHWA is required to consult with Tribes on a government-to-government basis whenever Federal-Aid Highway funds are issued to the Ohio Department of Transportation (ODOT), or when federal policies or regulations may affect Tribes. The Tribes must be given the opportunity to consult on projects when the use of federal funds have the potential to affect properties of significance to the Tribes. ODOT, in consultation with the Ohio State

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<sup>2</sup>As of May 2023, this includes: Absentee Shawnee Tribe of Oklahoma, Citizen Potawatomi, Delaware Tribe of Indians, the Delaware Nation, Eastern Shawnee Tribe of Oklahoma, Forest County Potawatomi, Miami Tribe of Oklahoma, The Osage Nation, Ottawa Tribe of Oklahoma, Peoria Tribe of Indians of Oklahoma, Pokagon band of Potawatomi, Prairie Band of Potawatomi Nation, Seneca-Cayuga Nation, Seneca Nation of Indians, The Shawnee Tribe, Stockbridge-Munsee Community Band of Mohican Indians, Tonawanda Seneca Nation, Turtle Mountain Band of Chippewa Indians, Tuscarora Indian Nation, Wyandotte Nation.

<sup>3</sup>Advisory Council on Historic Preservation (2013) NEPA and NHPA and Section 106.

Historic Preservation Office (SHPO) is legally responsible for ensuring compliance with Section 106 of the NHPA on federal-aid transportation projects in Ohio.

Tribal Consultation responsibilities may not be delegated to the state or ODOT. However, as previously agreed to in a Letter Agreement between FHWA and ODOT and as noted in the following Guide, FHWA may rely on ODOT to carry out day-to-day administrative, project-specific tasks on behalf of FHWA. FHWA retains responsibility to ensure overall consultation, including conflict resolution, and adherence to all Federal requirements and related laws. FHWA retains responsibility for government-to-government tribal consultation, and a Tribe may indicate at any time that they prefer to work directly with FHWA.

## BACKGROUND

Earthen mounds and elaborate geometric earthworks across the state of Ohio provide ample evidence of the long history of Native people living in and across this region. These groups were the ancestors of today's Tribes, who later occupied Ohio at varying times in different spaces until the period of forced and coerced American Indian removal throughout the early- to mid-1800s. During this time, Tribes were moved into lands west and south of the state<sup>4</sup>.

Despite the two centuries of conflict that resulted in the Tribes being deprived of their tribal lands in the state of Ohio, the Tribes are still alive, active, and invested in their ancestral territories. Federally recognized Tribes are sovereign nations which possess all the powers of self-government over their citizens and their territory, subject only to the limitations imposed by federal law. Tribes therefore possess a broad array of inherent rights including but not limited to their right to:

- form their own governments,
- adopt and enforce laws - both civil and criminal,
- establish tax on their lands,
- establish and determine membership (i.e., tribal citizenship),
- zone, license and regulate activities within their jurisdiction; and
- exclude persons from tribal lands.

Limitations on inherent tribal powers of self-government are few, but do include the same limitations applicable to states, e.g., neither Tribes nor states have the power to make war, engage in foreign relations, or print and issue currency.

Congress has recognized the right of Tribes to have a greater say over the development and implementation of federal programs and policies that directly impact them and their tribal members. Congress enacted two major pieces of legislation that together embody the important concepts of tribal self-determination and self-governance: The Indian Self-determination and Education Assistance Act of 1975, as amended (25 U.S.C. 450 et seq.) and the Tribal Self-Governance Act of 1994 (25 U.S.C. 458aa et seq.). Through these laws, Congress provided tribal governments with the authority to administer programs and services that would otherwise be administered by the Bureau of Indian Affairs (a U.S. Federal agency within the Department of the Interior, or BIA), for their tribal members. These laws continued to uphold the principle of tribal consultation, whereby the federal government consults with Tribes on federal actions, policies, rules, or regulations that will directly affect them.

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<sup>4</sup>See Exhibit A for a list of resources on the history of the Tribes in Ohio.

## Cultural Sensitivity

To the U.S. Department of Transportation (USDOT) and FHWA, a government-to-government relationship is a mutual recognition of the sovereignty of the parties involved; such understandings are also represented in statutes, executive orders, as well as USDOT and FHWA policies governing tribal consultation responsibilities (Exhibit B). To create a successful relationship, both parties must commit to interact in a manner respectful to each other. This includes understanding heritage and cultural differences, and how these differences influence decisions and actions. In particular, the importance of cultural sensitivity during consultation has been raised by the Tribes as an important factor in effective, timely, and meaningful consultation.

Cultural sensitivity requires a person to continually increase their awareness of the cultural differences between people. It is critical to understand that one's culture and history form a foundation to guide how and why one reacts and communicates in different situations. Cultural sensitivity means being aware of and accepting of cultural differences and understanding that cultural differences, behaviors, and actions in one culture may mean something entirely different in another. Understanding how something is done in another culture can create a link to understanding actions and reactions during consultation.

Empathy allows us to evaluate another person's behavior from within that person's cultural norms and values. This frame of reference allows for better communication between individuals and respecting and understanding the norms and values of other cultures, while maintaining our own values, and allows for acceptance and growth.

FHWA and ODOT are committed to listening and working to understand the differences, limitations, and issues that impact the Tribes on an everyday basis. Ultimately, the goal is to be able to view projects from the Tribes' perspectives, and build relationships based on trust, rather than becoming defensive because of a lack of understanding. During the 2016 Tribal Nations Transportation Summit, the Tribes brought forth the following points for thought and action (for more detail, please see "Summary of Outcomes from April 12, 2005, Tribal Consultation Meeting, Appendix C and 2016 Ohio Tribal Transportation Summit Summary and Action Items, Appendix D).

- FHWA and ODOT, including agency management, need to become more familiar with the Tribes, their histories, and their individual needs, including the flexibility to tailor consultation protocols to meet the needs of Tribes.
- The Tribes' principal concern remains respect for burials and repatriation efforts.
- Tribes want to be consulted on projects that involve new ground disturbance and should be provided with adequate notice of consultation so they may meaningfully plan for and actively participate in consultation.



- Tribes want to be involved in decisions about National Register eligibility and effects as well as impact to pre-contact sites and American Indian historic sites.
- Senior level officials from each agency who have the authority to obligate funds in addition to staff from the agency who conduct the day-to-day communication and coordination, should be actively involved when needed in the consultation process.
- Education about American Indian history and the Tribes' current presence is important at all levels, including federal and state government officials, stakeholders, and the general public. Measures to address educational concerns may include mitigation efforts, educational opportunities, and other solutions as part of the Section 106 Process.

FHWA and ODOT need to be aware of the political structures within each Tribe, including:

- Appropriate titles for addressing tribal leaders, which vary amongst the Tribes
- Maintaining an up-to-date contact list to reflect staffing changes
- Understanding the challenges of staffing shortages and issues with competing responsibilities for tribal governments
- Accommodating extended review times if requested
- Developing individual relationships with each Tribe.

Through awareness and accommodation of these tenets, FHWA and ODOT can respond to the needs of the Tribes and create and maintain a vital relationship built on mutual trust and respect. In this way, we work together on an everyday basis and are then able to weather trials and problems, together, in concert.

## CONSULTATION

At the broadest scale, consultation is conversation. However, effective consultation, is a two-way conversation. Experience tells us that conversations are most meaningful when a committed relationship is at its heart. Therefore, consultation is a continual conversation throughout a lasting, ongoing, and meaningful relationship built on trust, partnership, and respect.

This conversation, and all that comes with it, is at the heart of federal-tribal interactions and communication. Consultation dates to early treaty making processes between the U.S. Federal Government and various tribal sovereign nations, who conducted their interactions on a government-to-government basis. As a result, the term consultation frequently appears in treaties as defining the process for maintaining and conducting formal federal-tribal communication. More recently, it is found as a requirement in a variety of federal statutes, regulations, and policies (see Exhibit B).

However, we recognize the shortcomings of past consultation and the insincere tone that too often imbued these efforts as an obligatory preamble to the activities of government. In contrast to past attitudes, in Ohio we have established a commitment to genuine and intentional relationship building, collaboration, and respect that seeks true and effective consultation.

The term consultation appears in many laws, and the Department of the Interior Policy on Consultation with Indian Tribes states,

Consultation is a process that aims to create effective collaboration with Indian Tribes and to inform Federal decision-makers. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian Tribes or the government-to-government consultation process.

Although, as stated above, consultation is best done where communication is open and ongoing, another essential and indisputable tenet is that tribal sovereignty must be respected and preserved. In fact, these aspects of consultation must be present in all interactions with the Tribes, and not solely for required project consultation. Meanwhile, Kenneth E. Carleton of the Mississippi Band of Choctaw reported that, Government-to-government consultation is not project-specific – it is an ongoing responsibility to consult on anything that may affect tribal lands or sites of historical and cultural significance.<sup>5</sup>

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<sup>5</sup>Carleton, K.H. in National Environmental Justice Advisory Council, Indigenous Peoples Subcommittee (2000) Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making.

In terms of cultural sensitivity, we must remember that every Tribe expresses and executes their sovereignty in their own way. Therefore, each Tribe has its own preferences for communication with the Federal government, and as a result, consultation may have a different meaning for each Tribe. For example, some Tribes only recognize consultation when it takes place between high-ranking government officials and Tribal government leaders. Other Tribes are willing to acknowledge and sanction communications between lower ranking federal and tribal representatives.

In addition, a Tribe may wish to discuss topics or issues beyond the scope of a federal or state agency's agenda or purview, or they may have a different perspective from the agencies with which they are consulting. An agency should not attempt to steer or redirect the conversation, but instead, allow for and respect the Tribe's sharing of information, and later, forward inquiries to the appropriate agency, whenever possible.

## Consultation Continuum

One way to appreciate the mix of meanings that are ascribed to the term consultation is to view it as a continuum. There is a range of meanings, and all points on the continuum are essentially correct; however, some points may be closer to a particular Tribe's expectation about what constitutes consultation. Two points on the continuum stand out as general reference points.

- 1) Government-to-Government Consultation – This “big C” Consultation is formal communication on a government-to-government basis. It is conducted between the leaders of Tribal governments and senior representatives from the federal government. After a relationship has been developed, agreements may be reached that recognize and sanction communications between federal-tribal designated representatives. A key component of this type of consultation is the federal government's recognition of tribal sovereignty.
- 2) Other Consultation - This “little c” consultation is communication that frequently occurs between designated federal and Tribal middle level management and technical staff in meetings, through telephone contacts, and during on-site visits. Although it is sometimes not recognized by some Tribes as communication on a government-to-government basis, it serves as a useful conduit for sharing information, satisfying legal requirements, and developing relationships. ODOT, FHWA, and the Tribes perform this type of consultation on a daily, project-level basis.

The distance between these two points on the consultation continuum is at times subtle. It is often shaped by a variety of factors including:

- a Tribe's political structure
- a Tribe's preferred method(s) of communication
- subject matter
- underlying statutory, regulatory, or policy requirements
- the nature and complexity of the issues
- the degree to which the federal-tribal relationship has developed
- whether a protocol has been established

Given this situation, discretion is advised when consulting with Tribes, as the speaker and the listener may have different expectations about what is meant by consultation and how it should be conducted. As always, communication and understanding are critical.

## Guiding Principles for Consultation

Regardless of the type of consultation conducted, federal agencies should follow a set of guiding principles, which include, but are not limited to:

- Respecting tribal sovereignty and recognizing the government-to-government relationship that exists between the federal government and the Tribes.
- Make a reasonable and good faith effort to identify all federally recognized Indian tribes that have an interest in the state.
- Recognize each Tribe's culture and traditions.
- Accommodate access to and ceremonial use of sacred sites and ancestral burial grounds on Federal land.
- Consult with the Tribes prior to undertaking any actions that may significantly or uniquely impact them and/or properties of cultural significance.
- Ensure that the consultation provides the Tribe with a reasonable opportunity to identify concerns about historic properties, advise on the identification and evaluation of historic properties, articulate its views on the effects to such properties, and participate in the resolution of adverse effects.

## Tribal Consultation in Ohio Since 2005

To establish better and more defined relationships between FHWA, ODOT, and Tribes, a Tribal Consultation meeting was held in 2005 in Tulsa, Oklahoma<sup>6</sup>. This consultation was open to all sixteen Tribes on Ohio's tribal consultation list at the time. Seven Tribes and staff members from FHWA and ODOT attended. For those Tribes not in attendance, additional consultation was conducted through mail to document each Tribe's position and desires regarding project

<sup>6</sup>The major outcomes of the 2005 Tribal Consultation meeting are included in Appendix C.

consultation. After this meeting, a report was compiled and disseminated to all Tribes. This report informally served as the basis for FHWA's government-to-government relationship and project consultation with the Tribes.

Following this 2005 meeting, FHWA, ODOT, the Advisory Council on Historic Preservation (ACHP), and the Ohio State Historic Preservation Office (OSHPO) entered into a Programmatic Agreement (PA) that includes Tribal consultation issues related to the NHPA and Section 106. According to this agreement, FHWA and ODOT will consult with federally recognized Indian tribes (Tribes) that attach religious and cultural significance to historic properties in the area of potential effects (APE) of a project and invite them to be consulting parties.

In the years since this policy was implemented, there was an increasing desire to improve the consultation process and the day-to-day relationship with the Tribal governments. To address these concerns, in 2016, FHWA and ODOT organized the Ohio Transportation Tribal Summit<sup>7</sup> which met in Columbus, Ohio with representatives from nine Tribes, and staff from FHWA, ODOT and the SHPO. The purpose of this Summit was to use the 2005 report as a starting point to discuss how FHWA was meeting its obligations to consult with the Tribes and to make improvements to the consultation process.

The ultimate goal was to develop a formal guide and protocols—embodied in this document—to be individually tailored to each Tribe to outline how FHWA and ODOT consult with the Tribes.

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<sup>7</sup>A summary of the major points and list of the action items from the Summit are included in Appendix D.

## GOVERNMENT-TO-GOVERNMENT RESPONSIBILITIES

The Federal Government's unique relationship with federally recognized Indian tribes is derived from the U.S. Constitution, treaties, Supreme Court decisions, federal statutes, and executive orders. This relationship is rooted in American history, dating to the earliest contact between colonial and tribal governments. The U.S. Government recognizes Tribes as sovereign nations; thus, the relationship endures on a government-to-government basis. There are currently twenty federally recognized Tribes with expressed ancestral ties to Ohio, however, there are currently no tribal reservations or tribal trust lands in Ohio. A current list of these Tribes is maintained by FHWA and ODOT.

As an agency of the federal government and part of the USDOT, it is the responsibility of FHWA to initiate and carry out timely and meaningful consultation with Tribes. This is expected to be undertaken to the greatest extent permitted by law when the funding or actions of potential Federal-aid highway projects could affect resources that may be of concern to a Tribe. This responsibility may not be delegated to the state or state DOT. However, with the agreement of any of the Tribes with an interest in that project, the FHWA may rely on ODOT to carry out administrative, project-specific tasks on behalf of FHWA. FHWA, however, retains responsibility to ensure overall consultation, including conflict resolution, and adherence to all Federal requirements and related laws.

Exhibit B contains a comprehensive list of relevant statutes, executive orders, as well as USDOT and FHWA policies governing tribal consultation responsibilities. Additionally, two recent guidance documents for tribal consultation are discussed in more detail in Exhibit B but are also summarized here. The first document is the Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, issued by President Biden on January 26, 2021. This memorandum directs all executive departments and agencies to engage in regular, robust, and meaningful consultation with Tribal governments, and reaffirms the federal government's commitment to honoring its treaty and trust responsibilities to Tribal nations. The second document is the new USDOT Order on Tribal Consultation (5301.1A), issued on March 4, 2022, to update and replace the previous Order 5301.1 from 2011. The new Order reaffirms the USDOT's commitment to government-to-government consultation with Tribal nations and seeks to enhance the consultation process by providing greater clarity and guidance on the roles and responsibilities of both the USDOT and Tribal governments.

### Government-to-Government Consultation in Ohio

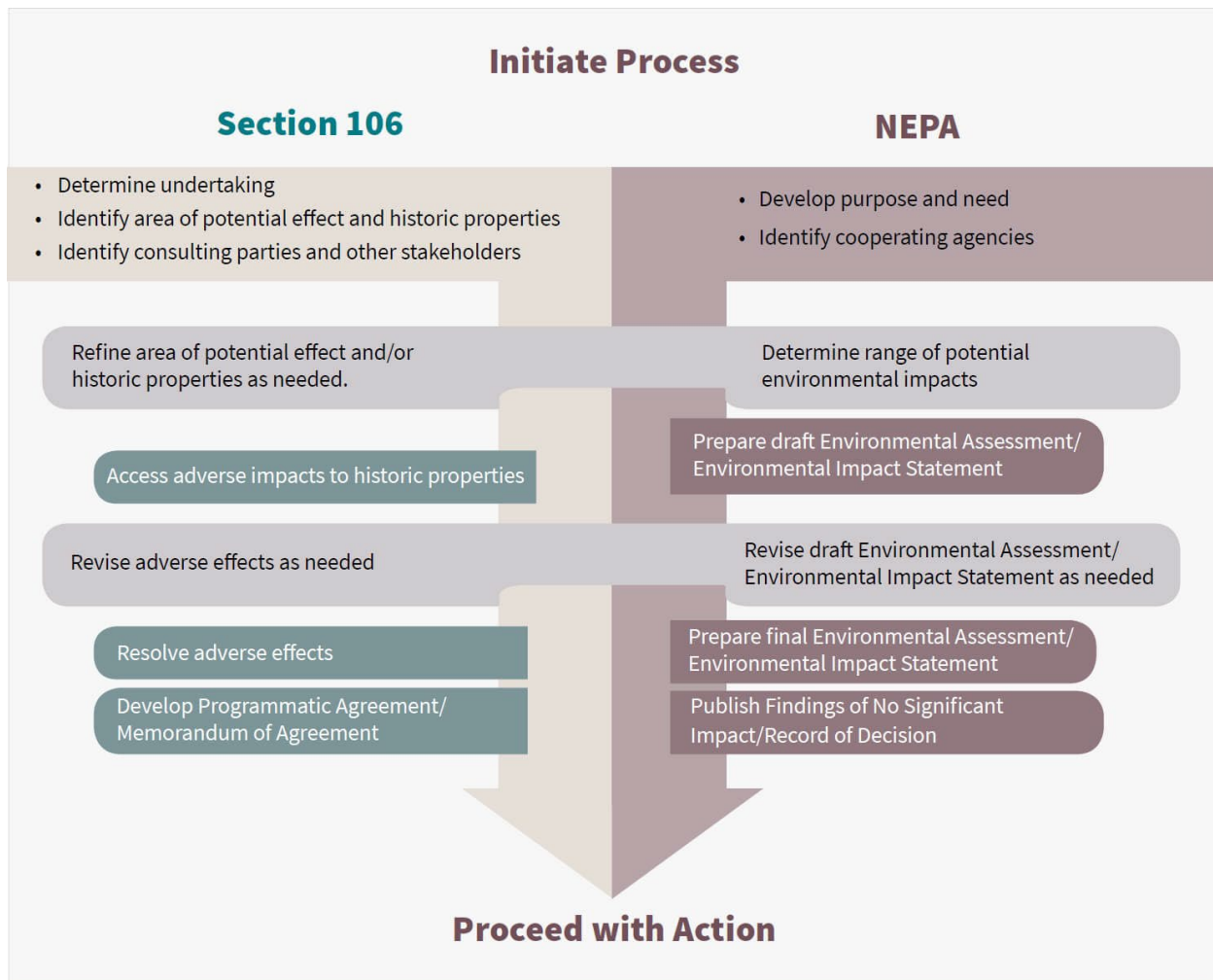
As it is the responsibility of the federal agency to make a reasonable and good faith effort to identify Tribes with whom to consult, agency officials initiate contact with Tribes at the highest level. For FHWA, consultation with a Tribe is initiated by the Ohio Division Administrator through

a letter to tribal leadership, when an interest in Ohio is expressed by a Tribe. As Tribes are sovereign nations and must be shown the same respect and formality as other nations, FHWA formally consults with individuals designated by the Tribal government or leadership for this purpose. Once the FHWA has initiated consultation with the Tribe, it may be acceptable to the Tribe for project-specific consultation to take place between FHWA staff and the Tribes. It is important to recognize that at any time, a Tribe may request that consultation be conducted solely through FHWA.

While the Federal government has a trust responsibility to Tribes, the states do not. The government-to-government relationship between each state and the Tribes with ancestral interest in that entity is much different than the government-to-government relationship between the federal government and the Tribes. States have no authority over tribal governments.

The Ohio Division of FHWA and ODOT participate in projects which have the potential to impact artifacts of religious or cultural significance to Tribes and/or human remains. A Letter Agreement between FHWA and ODOT originally documented the day-to-day administrative processes and procedures acknowledged between FHWA and ODOT in consulting with the Tribes, which are detailed in this Guide. The Agreement was executed in 2019 for an initial period of five years; the Agreement could be reviewed at any time for changes regarding how the Tribes desire to consult with FHWA (Appendix A). Based on this Agreement and prior consultation detailed above, the current procedures for consultation with the Tribes are detailed in the sections below of this Guide, and the execution of this Guide serves to replace the previous Letter Agreement. In addition, ongoing consultation with Tribes may lead to modifications of the process over time and these may be implemented through updates to this Guide once there is mutual agreement between the Tribes, FHWA and ODOT's Office of Environmental Services (ODOT-OES).

This Guide and the protocols contained within are intended to be simple and straightforward, as well as being adaptable to the individual interests of the agencies and Tribes as they relate to transportation projects in Ohio. This document reflects the trust and respect of the agencies and Tribes and is the fulfillment of commitments made since 2016 to document the relationship, communication, collaboration, and associated activities involved in consultation in Ohio. Further, this document serves as a living agreement and guide governing how the tribal consultation relationship takes place in Ohio.



Source: [Resource Guides \(ncpc.gov\)](https://www.ncpc.gov)

## Consultation under NEPA, NHPA, and other laws

The flow chart above highlights that Federal agencies' statutory obligations under NEPA and NHPA, Section 106 are independent, but integrating the processes creates efficiencies, promotes transparency and accountability, and supports a broad discussion of effects to the human environment. Where NEPA is a law where project decision making must adhere to environmental policies, Section 106's focus is on gaining information on historic properties and on consultation. FHWA applies these policies to the consideration of historic resources through both NEPA and Section 106. The Section 106 review must be complete prior to issuing a federal decision, so that a broad range of alternatives may be considered during the project development process. Because the information gathering and consultation done in the Section 106 review should inform the NEPA review, and vice versa, the timing of both reviews should be coordinated. Further detail about Section 106 and NEPA are presented in the following sections.



## National Historic Preservation Act (NHPA), Section 106

Section 106 requires that federal agencies must take into account the effects of their projects on historic properties. Federal agencies must afford the ACHP<sup>8</sup> a reasonable opportunity to comment regarding the undertaking (an undertaking means a project, activity, or program, financial assistance and/or requiring Federal permits, licenses, or approval). Section 106 applies when a federal undertaking may affect historic properties. Consultation means the process of seeking, discussing, and considering the views of others, and where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information [36 Code of Federal Regulations (CFR) 800.16(f)].

The process for meeting Section 106 requirements is defined in ACHP regulations (36 CFR Part 800), which provide both overall direction and specific requirements for consultation at each step of the review process. The ACHP's regulations are prescriptive in nature and direct agencies on appropriate consultation processes.

### Consultation under Section 106

The NHPA established that historic properties of “traditional religious and cultural importance to a Tribe may be determined to be eligible for inclusion” in the National Register of Historic Places (NRHP). Federal agencies are specifically instructed to consult with Tribes when a project has the potential to affect properties of traditional religious and cultural importance.

Frequently, historic properties of religious and cultural significance are located on ancestral lands of Tribes. The consultation requirement for properties of traditional religious and cultural importance applies regardless of the location of both the historic property and the Tribe.

### Section 106 Programmatic Agreement (PA)

To comply with the NHPA, and in accordance with 36 CFR § 800.3(f)(2), FHWA, ODOT, the ACHP, and the SHPO entered into a Programmatic Agreement (PA): *Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, Ohio's State Historic Preservation Office, and the State of Ohio, Department of Transportation Regarding Implementation of the Federal-Aid Highway Program in Ohio* (Agreement) that includes Tribal consultation issues, Updated June 29, 2023 (Appendix B). However, Tribes were not party to this agreement and are not legally bound by it.

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<sup>8</sup>An independent federal agency, the Advisory Council on Historic Preservation (ACHP) promotes the preservation, enhancement, and productive use of our nation's historic resources and advises the President and Congress on national historic preservation policy. It also provides a forum for influencing federal activities, programs, and policies that affect historic properties.

As stated in the PA, FHWA and ODOT consult with Tribes that attach religious and cultural significance to historic properties in the area of potential effect (APE) of a project and invite them to be consulting parties. Consultation with Tribes will follow procedures that are established with each individual Tribe. For projects following the Section 106 consultation process covered under this PA, ODOT communicates with the Tribes using the most current Tribal contact list maintained by FHWA and ODOT.

Under the PA, the ODOT Office of Environmental Services cannot delegate Section 106 consultation responsibilities to other entities including local public agencies. ODOT is responsible for ensuring that locally administered projects are in compliance with federal and state environmental laws.

The PA contains stipulations to account for the effects of the program on historic properties in Ohio and govern consultation under Section 106 of the NHPA until the agreement expires or is terminated. The sections of specific interest to the Tribes include responsibilities under NEPA Assignment, consultation with federally recognized Tribes, post review discoveries and the treatment of human remains.

### Consultation under other laws

There are instances when a project requires tribal consultation to satisfy another law or regulation. The PA does not account for tribal consultation conducted outside of the Section 106 consultation process, and such situations are not covered in the document. Examples of this include transportation planning requirements 23 CFR 450.210, and the Section 1305 Process under MAP-21 consultation due to the interest of a project to a Tribe or Tribes. For projects under the Section 1305 process, the FHWA Desktop Procedure and ODOT Project Development Process (PDP) will be followed for communications strategy with the Tribes. In these and other cases not involving Section 106, FHWA is responsible for taking the lead in initiating communication with the Tribe(s). After initial communication has been established and the Tribe is in agreement, ODOT may communicate administrative, and project-specific information on behalf of FHWA with the Tribe(s), unless a Tribe requests continued direct consultation with FHWA.

The terminology and guidance for Tribal consultation is reflective of ODOT's PDP. FHWA and ODOT agreed to document any communication with the Federally recognized Tribes in the appropriate project file.

## National Environmental Policy Act (NEPA)

NEPA is a procedural law which requires that the policies, regulations, and laws of the federal government be interpreted and administered in accordance with its environmental protection goals. NEPA also requires Federal agencies to use an interdisciplinary approach in planning and decision-making for any action that adversely impacts the environment.

FHWA manages the NEPA project development and decision-making process as an "umbrella," under which all applicable environmental laws, executive orders, and regulations are considered and addressed prior to the final project decision and document approval. Conclusion of the NEPA process results in a decision that addresses multiple concerns and requirements.

The FHWA NEPA process allows transportation officials to make project decisions that balance engineering and transportation needs with social, economic, and natural environment factors. During the process, a wide range of partners including the public, businesses, interest groups, and agencies at all levels of government, provide input into project and environmental decisions.

## Consultation Under NEPA

It is FHWA's responsibility to identify potential cooperating or participating agencies with respect to Environmental Assessment (EA) and Environmental Impact Statements (EIS) projects. Cooperating or participating agencies have legal jurisdiction or special expertise with respect to certain resources. FHWA will initiate and carry out consultation with Tribes when resources of interest to them may be impacted by Federal-aid highway projects. Regarding NEPA documentation, ODOT conducts tribal consultation as determined through ongoing discussions with the Tribes. The amount of effort to consult should reflect the scope of the project, the types of anticipated impacts and the degree of sensitivity of resources in the project's study area and/or APE. ODOT and FHWA communicate and coordinate, as projects may involve more intensive and extensive consultation.

## NEPA Assignment and Tribal Consultation

In 2015 ODOT entered into the Surface Transportation Project Delivery Program (23 U.S. Code 327) or NEPA Assignment<sup>9</sup>. Under NEPA assignment the Secretary of the US Department of Transportation (USDOT) assigns and a state assumes the Secretary's responsibilities under NEPA and other environmental laws for highway projects. Under NEPA assignment, the State assumes the process, decision-making, and legal responsibility for NEPA that FHWA typically carries out during project review and delivery. Once a State is granted NEPA assignment it is subject to the same procedural and substantive requirements placed on FHWA per NEPA, as outlined in a Memorandum of Understanding (MOU)<sup>10</sup>. The MOU was renewed on December 14, 2020. DOT staff assume responsibility for environmental reviews and can make project decisions.

Under NEPA Assignment, ODOT, in consultation with the Ohio SHPO, is legally responsible for ensuring compliance with Section 106 of the NHPA on federal-aid transportation projects in Ohio. However, FHWA retains responsibility for government-to-government tribal consultation as set forth in the Constitution of the United States, treaties, statutes, and court decisions.

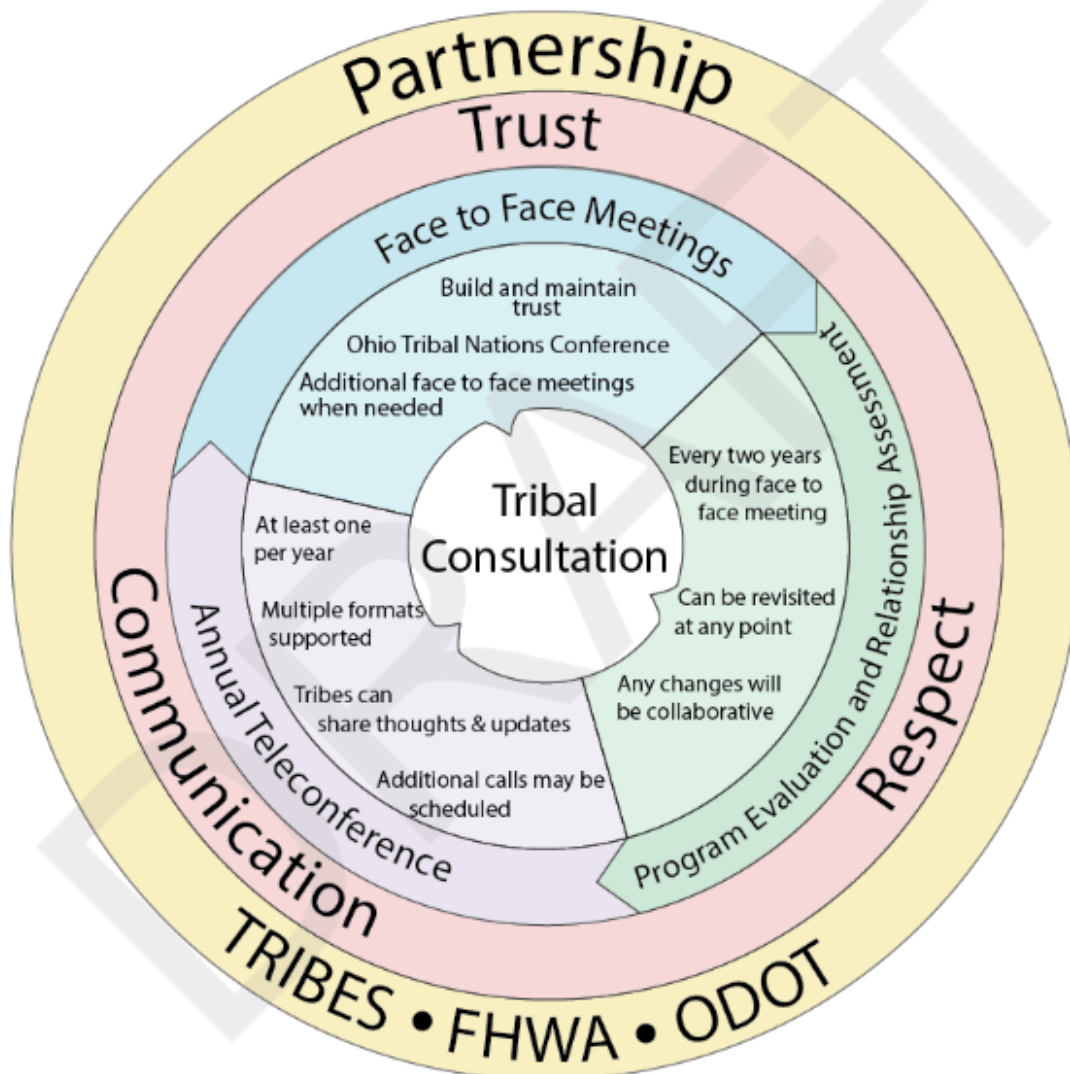
Tribal Consultation responsibilities may not be delegated to the state or ODOT. However, FHWA may rely on ODOT to carry out administrative, project-specific tasks on behalf of FHWA. FHWA, however, retains responsibility to ensure overall consultation, including conflict resolution, and adherence to all Federal requirements and related laws. FHWA retains responsibility for government-to-government tribal consultation, and a Tribe may indicate at any time that they prefer to work directly with FHWA.

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<sup>9</sup>Authorized under the Moving Ahead for Progress in the 21st Century Act (MAP-21)

<sup>10</sup>First MOU was signed on December 28, 2015

## OHIO TRIBAL CONSULTATION PROTOCOLS



## ODOT and FHWA Action

In accordance with the 2019 Letter Agreement between FHWA and ODOT, and this Guide documenting the current processes and procedures acknowledged between FHWA and ODOT for consulting with the Tribes, ODOT consults with the Tribes on behalf of FHWA. However, FHWA continues to have the legal responsibility to ensure that government-to-government consultation is properly conducted. The tribes can, at any time, request direct consultation with FHWA. ODOT will include FHWA contact information in all correspondence with the tribes. It is clearly understood, however, that ODOT's handling of administrative, project-specific tasks on behalf of FHWA in no way assumes or replaces FHWA's government-to-government relationship with the federally recognized tribes.

During the transportation planning process, and Statewide Transportation Improvement Program (STIP) and the Metropolitan Planning Organizations' (MPOs) individual Transportation Improvement Programs (TIPs) development, project details are fairly general at this stage and frequently limited to project location and type of work. Project specifics such as construction limits and resource impacts have yet to be determined. These come later during the environmental phase of project development. If a tribe is interested in project information at this early stage and/or would like to review the STIP and TIP they can access this and other contact information at: [Statewide Transportation Improvement Program \(STIP\) | Ohio Department of Transportation](#).

Once the project enters the environmental planning stage, more information is gathered such as project limits, extent of construction, types of resources present, and project impacts to such resources. At this stage, project consultation will be initiated by ODOT's tribal liaison. This typically occurs when the project area has been surveyed and at the same time as coordination with the Ohio SHPO occurs. For the majority of Ohio's transportation program, which is comprised of small maintenance or safety upgrades, this detailed information is only available after an initial field review and survey. Regardless, the intent is to provide the tribes with quality information as soon as it is produced on a project, and consultation will be conducted with the tribes early enough for tribal responses to make a difference in project planning.

Consultation will be conducted through various means, keeping in mind preferences regarding mail, email, and other types of communication desired by the tribal contacts. It is important that consultation be customized to meet the needs of individual tribes. As such, ODOT and FHWA will cater to a Tribe's individual needs and wishes as much as possible. It should be clearly noted that each Tribe can have a completely unique and customized coordination and consultation plan. Each customized approach will be the result of a two-way conversation that seeks to find the best and most appropriate approach.

Consultation packages will include the Section 106 determination and justification, locational mapping, field review summaries (disturbance assessments, archaeological survey reports, etc.), and other available pertinent information (preliminary plans, aerial photographs, etc.). For Tribes choosing to use EnviroNet as their means of project notification, this information can be accessed through the project file (see ODOT's EnviroNet System and Tribal Notification section below).

## Tribal Action

After receipt of project information and the Section 106 determination, ODOT will request a response from the Tribe within 30 days. However, requests for more time will always be considered and are generally possible given the amount of time allowed for project development (most projects are studied a year or two in advance of the start of construction). Regardless of the project schedule, ODOT will accept comments at any point in the process, even if submitted after the 30-day review period.

The Section 106 process should be seen as open and continuous and allow for comments at any point in the process, whether the comments are made during the planning phase or during and even after construction. In short, a Tribe may enter the process at any time during project development and into and beyond construction.

If a tribe has questions or concerns, ODOT and FHWA, if warranted, will respond within 10 business days. If a tribe indicates disagreement with the Section 106 determination, the ODOT tribal liaison will initiate follow-up consultation to resolve any differences. ODOT's tribal liaison will also file any comments, questions or concerns offered by a Tribe in the project file in EnviroNet and copy FHWA, to ensure the comment is reasonably considered in project planning. Any response from ODOT and/or FHWA will be part of the permanent record and filed accordingly.

## Circumstances Requiring Detailed Consultation

FHWA and ODOT recognize there will be occasions where typical project consultation is not appropriate or suitable for the project situation or resource. For instance, when human remains, mounds, earthworks, etc. are identified during the planning or construction phases of the project, or a sensitive location is disclosed by a tribe, consultation will follow a more detailed and intensive path. This will also include cases of inadvertent discovery of human remains during construction activities<sup>11</sup>.

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<sup>11</sup>Following the Ohio History Connection (OHC) Inadvertent Discovery Policy, inadvertent discovery is defined as follows: Inadvertent discovery means the unanticipated and unintended encounter, detection or discovery of American Indian ancestral human remains, funerary objects, sacred objects, cultural resources or objects of cultural patrimony found during any ground-disturbing activity or natural disturbance.

While more detailed and specific actions and tasks will be identified in each situation, the consultation will, at a minimum, progress through the following steps (these are also included in ODOT's Construction and Materials Specifications manual, the Section 106 PA, and NEPA Assignment documentation; refer to references in Exhibit A and legal requirements for consultation in Exhibit B, as well as the Section 106 PA in Appendix B):

- All construction activity shall immediately stop within a minimum of 100 feet of the discovery and avoid further disturbance.
- Construction personnel shall immediately contact ODOT's District Environmental Coordinator who will then inform ODOT-OES. ODOT-OES will immediately inform FHWA.
- The discovering party must make a reasonable effort to identify and delineate the area of disturbance and protect and secure the discovery from vandalism and exposure.
  - Following the Ohio History Connection (OHC) Inadvertent Discovery Policy, at a minimum, securing the area will include flagging off the area of discovery and, if the circumstances of the discovery make it reasonable to do so, implementing measures to protect the discovery from vandalism and looting including posting a guard or monitor at the site until the proper authorities are notified to ensure the remains are not touched, moved, or further disturbed.
- ODOT will inform local and state police and the county coroner/medical examiner to determine if the remains are of medical-legal concern.
- Immediately upon discovery but not longer than 48 hours, the ODOT tribal liaison will contact the Tribes and the Ohio SHPO to initiate consultation and make the first notification of the inadvertent discovery.
  - In circumstances where human remains are identified, the ODOT tribal liaison will contact all appropriate tribal representatives, recognizing that the Tribes may have different contacts for human remains/Native American Graves Protection and Repatriation Act (NAGPRA)-related discoveries. In those cases, both the NAGPRA and project contacts will be notified so both are aware. Given the seriousness and time-sensitivity that such discoveries entail, ODOT will not rely solely on EnviroNet, emails, or letters to initiate consultation. In the event that ODOT is unable to make contact via phone, the tribal liaison will follow up with emails and other forms of communication. Following initial contact, ODOT will send any pertinent information via mail/email, according to a Tribe's preferences.
  - Written documentation of the discovery, the circumstances of discovery, as well as the location and the condition of the discovery and any detailed information



that may benefit the decision-making process will be documented and provided to tribal representatives with this initial notification. Anticipated next steps for consultation and contact information for ODOT and FHWA representatives will also be included.

- A more detailed follow-up should be made within 72 hours following the discovery, including the coroner/medical examiner's initial findings.
- No construction activities shall resume within the restricted area around the discovery until a course of action is mutually determined through consultation, as described further below.

The following cultural considerations will also be respected; these guidelines are in accordance with respectful treatment of human remains and funerary objects, and are guidelines only, but strongly recommended for implementation immediately after discovery and during subsequent stabilization/protection:

- Site access is restricted to necessary personnel only.
- No use or possession of tobacco products within 20 feet of the burial location or the remains themselves, including the associated funerary objects.
- No food or beverages within 20 feet of the burial site or the remains themselves, including the associated funerary objects.
- Only law enforcement and coroner/medical examiner personnel shall take photographs or make drawings of the discovery unless consent is given by the consulting Tribes. Any such images shall be kept secure and confidential and may be subject to tribal repatriation.

Consultation will determine the exact course of action and next steps, allowing for consultation to be tailored to the specific situation and circumstances. Consultation may result in a treatment plan to be implemented. This plan will include provisions for physical examination of the site by tribal experts and facilitate access as requested for tribal monitoring or ceremonial activities, as determined through consultation.

Should human remains be identified, ODOT will avoid the location and leave the remains in place if at all possible. However, if this option is not feasible due to the nature and scope of work being conducted, tribal consultation will determine the next steps. Reburial as close to the original location is preferred, but other options that arise through consultation will also be considered. All human remains that are identified will be treated with the utmost care, dignity, and respect at all times. FHWA will be involved at all stages of the process as the lead federal agency responsible for government-to-government consultation.

## Sensitivity and Education

As part of the archaeological review on any given project, sensitive information may be collected and discussed in the appropriate documents. This sensitive information will be clearly marked as “Sensitive Information” within the documents and will not be openly disseminated to the public. Each project will be considered on a case-by-case basis to redact any of this sensitive information as deemed appropriate wherever possible. Any locational information, such as GPS coordinates and general mapping, will not be filed in the project’s environmental review file. ODOT and FHWA commit to ensure that such sensitivity will be part of ODOT’s PDP.

## Program Level Consultation: Beyond Project Consultation, Additional Elements of Successful Consultation

While the protocol formally details the step-by-step actions undertaken during consultation, it is important to remember that consultation, as a relationship and a conversation, is more than just procedures. In particular, FHWA and ODOT have implemented three elements that serve to continue conversations with the Tribes in a way that is accessible and beneficial to all parties: face-to-face meetings, program evaluation and relationship assessment, and an annual teleconference.

### Face-to-Face Meetings

Building mutual trust and meaningful relationships is a significant priority for both tribes and agencies and nothing aids in this more than face-to-face meetings. The Ohio Tribal Nations Conference is an excellent opportunity to hold scheduled face-to-face meetings. Not only do these meetings provide opportunities to reconnect with tribal representatives and share information, but they also allow time to meet new representatives who may have been recently hired or are new to the consultation process. Partnering with the Ohio History Connection has provided the opportunity to hold this conference every year (OHC and ODOT taking turns funding the conference every other year). Additional face-to-face meetings are always an option whenever the tribes or ODOT-OES deems them appropriate, specifically with project field meetings.

### Annual Phone Conferences

In March 2017, ODOT and FHWA held a tribal consultation phone conference. Since that time, it was determined that at least one phone conference would be useful to provide updates on programs and projects and allow tribes to connect and share thoughts. Two phone conferences are desired unless there is a face-to-face meeting like the Tribal Nations Conference, in which case there would be a phone conference roughly 6 months from the conference date. Given

ODOT's and OHC's commitment to have the conference each fall, one phone conference will be scheduled in the spring of each year. As with the other modes of communication, additional phone conferences can be scheduled to address and discuss projects, tribal affiliations, tribal work/projects/consultation, etc. as warranted.

## Program Evaluation and Relationship Assessment

Evaluation of these protocols is closely tied to the commitment to meet regularly and communicate through other means on a regular basis. In general, protocols will be evaluated every two years. However, it can be revisited at any point by any party at any time. The protocol is considered a living document and subject to revision and additions as needs arise. Any changes will be evaluated through a collaborative process where all can share their thoughts and concerns.

## ODOT's EnviroNet System and Tribal Notification

In 2016, ODOT and FHWA hosted the Tribal Nations Transportation Summit in an effort to update a tribal consultation protocol established with the Tribes in 2005. FHWA and ODOT used the 2005 report as a starting point to discuss how FHWA was meeting its obligations to consult with the Tribes and to make improvements to the consultation process. During the Summit, ODOT and FHWA learned there was a wide variation in consultation needs and preferences. One of the key action items included developing a tribal access system which would include individually tailored notification and protected entry into ODOT's EnviroNet system (an online environmental documentation system).

Using information and preferences relayed from tribal representatives, ODOT enhanced the EnviroNet system to allow the Tribes to customize a profile and receive notifications and project information based on their preferences. These upgrades, rolled out in October 2018, also provide the Tribes the opportunity to enter comments and receive responses from the agencies for each project.

Essentially, tribal users interact with the system in three steps:

### 1. Establish Profile and Password

- ODOT's Tribal Liaison works with each Tribe to set up an account in EnviroNet.
- Each Tribe establishes a unique, customized profile (they can set up their own profile or request assistance from ODOT's Tribal Liaison). Each Tribe specifies the types of projects, location of projects, complexity of the project, at what point in the PDP they want to be notified and become involved, etc.
- Each Tribe establishes a unique password for protected access to the EnviroNet system.

## 2. Tribal Notification

- Once a Tribe has an EnviroNet account and the tribal profile is established, their representative(s) will be automatically notified when a project meeting their specifications is submitted.
- A Tribe will receive project information via email, based on their individual profile.
- These automatic notifications include a link to the EnviroNet system where the representative can access the submittal as well as any documentation in the project file.
- When a tribal notification is sent to a Tribe, the EnviroNet system disables the ability to move forward with the project or approve the environmental document for 30 days. Building a 30-day review period into the EnviroNet system ensures that environmental documents are not approved prior to the Tribes having an opportunity to comment.
- After 30 days, if no objections have been received from the Tribes, ODOT may move forward with the environmental process. However, if a Tribe needs additional information or additional time, they can contact the ODOT Tribal Liaison or make a request in the system.
- While Tribes are requested to respond within 30 days, we will make every effort to accommodate requests for additional time.

## 3. Comments, Response and Documentation

- Once the Tribe reviews the information in EnviroNet, they are provided an opportunity to submit comments electronically through the system. ODOT-OES can also respond to comments in the system.
- A Tribe may upload a PDF of a response letter to the project file. Tribes may also choose to send their responses via email.
- This information is automatically copied to FHWA.
- If the tribal representative wishes to access other project files or upload correspondence, they may do that as well.
- Regardless of the project schedule, ODOT will accept comments at any point in the process, even if submitted after the 30 day review period.
- The Section 106 Process should be seen as open and continuous and allowing comments at any point in the process is consistent with that view, whether the comments are made during the planning phase or during and even after construction. Simply stated, a Tribe may enter the process at any time.

ODOT and FHWA understand that some Tribes do not prefer working within EnviroNet and/or have not had time to familiarize themselves with the system. ODOT will continue to provide project information to those Tribes as they desire and request. ODOT will also provide support and assistance to Tribes in the use of the system.

The EnviroNet Tribal Notification feature is one of the many tools ODOT and FHWA use for project coordination and consultation and is one of the main vehicles for disseminating information to the Tribes. Other forms of communication (i.e., written letters, emails, etc.) will continue based on each Tribe's need and preference. While ODOT and FHWA recognize that these automatic EnviroNet notifications are not consultation, it does provide the opportunity to share information at a faster pace than previous methods and will ultimately lead to an increase in consultation opportunities and better information sharing.

ODOT and FHWA understand that the EnviroNet system is a notification system and does not constitute consultation in and of itself. ODOT and FHWA are committed to maintaining personal contact with the tribal representatives and engaging with the Tribes in consultation. ODOT, on behalf of FHWA, is also committed to reaching out personally to each Tribe if there is a project likely to be of concern. For example, if a project will impact a pre-contact site, constituting an Adverse Effect, ODOT will not solely rely on EnviroNet to alert the Tribes. Every effort will be made to contact the tribal representative via phone call or email and provide the appropriate information for review and comment.

## MOVING FORWARD

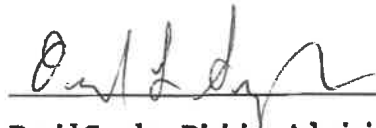
At the heart of any consultation is the commitment to continue the relationship as an open conversation. This Guide outlines the basics of the relationship and serves as a commitment to partnership in that ongoing conversation. However, within this basic framework and that commitment lies great opportunity for flexibility and creativity. Since every project, every resource, and every situation is different, adaptability becomes one of the most important tools in consultation. Effective protocols should therefore allow for a wide range of possibilities and not hinder opportunities for creativity as encouraged in the Section 106 Process. Therefore, it is vitally important to create protocols that allow for flexibility throughout the entire process in concert with the details of a project, resource, or situation.

The purpose of this Guide is to provide a formal plan and protocols that can be tailored to each Tribe for FHWA and ODOT to use in tribal consultation. Evaluation of these protocols is closely tied to the commitment to meet regularly and communicate through other means on a regular basis. In general, these protocols will be evaluated every two years. The signatory pages following this Guide provide demonstration of the commitment of each signing party to this relationship and the protocols outlined in this Guide.

**Guide to Tribal Nations - FHWA – ODOT Consultation in Ohio**

The parties hereby acknowledge and reaffirm their commitment to the relationship and the protocols outlined in this Guide.

**FEDERAL HIGHWAY ADMINISTRATION**



David Snyder, Division Administrator


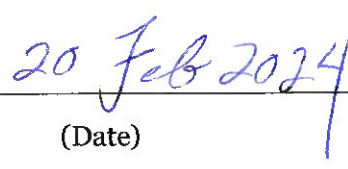
2/22/2024

(Date)

**Guide to Tribal Nations - FHWA – ODOT Consultation in Ohio**

The parties hereby acknowledge and reaffirm their commitment to the relationship and the protocols outlined in this Guide.

**OHIO DEPARTMENT OF TRANSPORTATION**

Jack Marchbanks, PhD, Director

(Date)



## **Guide to Tribal Nations - FHWA – ODOT Consultation in Ohio**

The parties hereby acknowledge and reaffirm their commitment to the relationship and the protocols outlined in this Guide.

Add Tribal Signatories pages and/or certifications

## APPENDICES and EXHIBITS

### Exhibit A: Resources and References

#### Resources - History of American Indian Tribes in Ohio

- Hurt, R. Douglas (1996) The Ohio Frontier: Crucible of the Old Northwest, 1720-1830.
- O'Donnell, James H. (2004) Ohio's First Peoples
- Stockwell, Mary (2014) The Other Trail of Tears: The Removal of the Ohio Indians
- Tanner, H.T. (1987) Atlas of Great Lakes Indian History.
- ... [To be added by reviewers as submitted]

#### References –

- ODOT's Construction and Materials Specifications Manual; [Manuals & Specifications | Ohio Department of Transportation](#)
- Ohio History Connection (OHC) American Indian Policy (10-18-19) and Supplement for Inadvertent Discovery Procedures (3-8-21); [American Indian Policy \(ohiohistory.org\)](#); [OHC\\_Inadvertant-Discovery-Procedures\\_Board-Approved-2021-03-18.pdf \(ohiohistory.org\)](#)
- Ohio Archeology Guidelines – Section: Cemeteries, Burial Mounds, and Other Burial Places (2022), State Historic Preservation Office, Ohio History Connection; [Archaeology Guidelines - Ohio History Connection](#)

## **Exhibit B: Legal Requirements and Directives to Consult with Indian Tribes**

### Statutes and Regulations

Several statutes impose requirements on Federal agencies to consult or coordinate with Indian Tribes. It is useful to be familiar with the various requirements not only to ensure compliance, but also to explore opportunities to integrate consultation requirements. For instance, if a project requires compliance with both NHPA and the National Environmental Policy Act (NEPA), it is beneficial to simultaneously collect information and carry out consultation under both statutes.

In addition, FHWA communicates with interested Tribes early in the planning process to identify special considerations or specific requirements for consultation, such as a local resource or area that holds religious and cultural significance that may be impinged upon by a proposed transportation project.

The following are summaries of the key statutes that require consultation with Indian Tribes or accommodation of tribal views and practices. This is not an exhaustive list of requirements, nor does it imply that each of these statutes is applicable to each proposed project.

- The National Historic Preservation Act (NHPA) of 1966, as amended, codified at 54 U.S.C.300101 et seq. is the basis for the tribal consultation provisions in the Advisory Council on Historic Preservation's (ACHP) regulations, codified at 36 CFR Part 800. The two amended sections of the NHPA that have a direct bearing on the Section 106 review process are:
  - Section 101(d)(6)(A), which clarifies that historic properties of religious and cultural significance to Indian Tribes may be eligible for listing in the National Register of Historic Places, and
  - Section 101(d)(6)(B), which requires that Federal agencies, in carrying out their Section 106 responsibilities, consult with any Indian Tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking.

- Section 106 of NHPA requires Federal agencies to consider the effects of their actions on historic properties and to seek comments from the ACHP. This requirement applies to undertakings located on or off tribal lands. Also known as the Section 106 review process, it avoids unnecessary harm to historic properties from Federal actions. Its procedure for meeting Section 106 requirements is defined in the ACHP's regulations, 36 CFR Part 800, "Protection of Historic Properties." The ACHP's regulations incorporate these provisions and reflect other directives about tribal consultation from Executive orders, Presidential memoranda, and other authorities. The regulations include both general direction regarding consultation and specific requirements at each stage of the review process.
- The National Environmental Policy Act of 1969 (NEPA) requires the preparation of an environmental impact statement (EIS) for any proposed major Federal action that may significantly affect the quality of the human environment. The statutory language of NEPA does not mention Indian Tribes. However, the Council on Environmental Quality (CEQ) regulations do require agencies to contact Indian Tribes and provide them with opportunities to participate in various stages of preparation of an EIS. NEPA Regulations are codified at 40 CFR Part 1500-1508.
- The American Indian Religious Freedom Act of 1978 establishes the policy of the Federal Government "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."
- The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) requires agencies to consult with Indian Tribes regarding planned activities on Federal and tribal land that might result in the excavation of Native American human remains or other cultural items as defined in NAGPRA. When there is an inadvertent discovery of human remains or cultural items on Federal or tribal lands, work in the area must cease, the

land-managing agency must notify the appropriate Tribe(s), and consultation must be initiated. On tribal lands, the consent of the appropriate Indian Tribe is required for planned excavation or removal of human remains and cultural items. NAGPRA Regulations are codified in Title 43 of the CFR at Part 10. A Final Rule on Revised Regulations for NAGPRA Implementation became effective January 12, 2024.

### Executive Orders

In many instances, executive orders apply to agencies on an agency-wide or program-wide basis rather than on a project-by-project basis. However, for working or coordinating with Indian tribal governments it is good to be familiar with the applicable Executive orders and act in accordance with the intent of the directives. Several of the orders specific to consultation with Indian Tribes include:

- Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (November 6, 2000; reaffirmed 2021) directs Federal agencies to respect tribal self-government and sovereignty, tribal rights, and tribal responsibilities whenever they formulate policies “significantly or uniquely affecting Indian tribal governments.” The Executive order applies to all Federal agencies, encouraging “meaningful and timely” consultation with Tribes, and consideration of compliance costs imposed on tribal governments when developing policies or regulations that may affect Indian Tribes.
- Executive Order 13007, “Indian Sacred Sites” (1996), applies to all federally owned lands except “Indian trust lands.” It encourages land-managing agencies to:
  - accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, and
  - avoid adversely affecting the physical integrity of such sites.
- Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (1994), is designed to focus Federal attention on the environmental and human health conditions in minority communities and low-income communities. It is also designed to promote nondiscrimination in Federal

programs substantially affecting human health and the environment. Specifically, Section 6-606 of the order states that “each Federal agency responsibility set forth under this order shall apply equally to Native American programs.”

- Executive Order 13274, “Environmental Stewardship and Transportation Infrastructure Project Reviews” (2002), aims to enhance environmental stewardship and streamline the environmental review and development of transportation infrastructure projects.
- Executive Order 12372, “Intergovernmental Review of Federal Programs”(1982), structures the federal government’s system of consultation with state and local governments on its decisions involving grants, other forms of financial assistance, and direct development. Under E.O. 12372, states, in consultation with their local governments, design their own review processes and select those federal financial assistance and direct development activities they wish to review.
- Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, (January 26, 2021): Executive Order 13175 charges all executive departments and agencies with engaging in regular, meaningful, and robust consultation with Tribal officials in the development of Federal policies that have Tribal implications. This memorandum reaffirms the policy announced in the Presidential Memorandum of November 5, 2009 (Tribal Consultation), requiring each agency to prepare and periodically update a detailed plan of action to implement the policies and directives of Executive Order 13175.

#### United States Department of Transportation (U. S. DOT) and FHWA Policies:

The U. S. Department of Transportation (DOT) and FHWA have programs, policies, and procedures that require or encourage FHWA and other DOT agencies to consult with Indian Tribes.

- DOT Order 5301.1A (March 4, 2022) This Order conveys policy, delegates authority, and assigns responsibility to ensure that the United States Department of Transportation (DOT or Department) and its Operating Administrations (OAs), including all components of the Office of the Secretary (OST), meet the requirements related to consultation with Indian Tribes pursuant to Executive Order (EO) 13175, Consultation and Coordination with Indian Tribal Governments, and other applicable requirements set forth in statute, regulation, or executive actions. With this Order, the Department will also ensure that programs, policies, and procedures administered by DOT are responsive to the needs and concerns of Indian Tribes. This Order cancels: a. DOT Order 5301.1, Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes, issued November 16, 1999, and b. U.S. Department of Transportation Tribal Consultation Plan, (2010). c. This Order is effective upon issuance.
  - Establishes a more comprehensive framework for consultation that includes a Tribal Consultation Plan (TCP) and requires each USDOT operating administration to develop and implement its own TCP. The TCP outlines the specific consultation procedures and processes for each administration and ensures that consultation is conducted in a consistent and coordinated manner across the USDOT.
  - Includes new provisions that emphasize the importance of building and maintaining trust between the USDOT and Tribal nations, promoting meaningful and respectful consultation, and ensuring that Tribal perspectives and priorities are considered in all aspects of USDOT decision-making. Additionally, the Order directs the USDOT to provide training and resources to its staff on Tribal consultation and nation-to-nation relationships.
  - Represents a significant update and improvement to the USDOT's approach to consultation with Tribal nations and underscores the importance of Nation-to-Nation relationships in promoting safe, efficient, and equitable transportation systems.

- FHWA guidance developed by the Indian Issues Task Force on government-to-government relations with federally recognized Indian Tribes still applies today. It promotes collaborative decision making with Indian tribal governments, and directs FHWA to:
  - Ensure that during the transportation planning and FHWA NEPA processes, Tribes are consulted, and tribal concerns are considered for federally funded State transportation projects that affect tribal trust resources, tribal communities, or Indian interests.
  - Assist State transportation agencies (STAs) and Metropolitan Planning Organizations (MPOs) in understanding the transportation, environmental, and cultural needs and interests of the different Indian tribal governments, to effectively involve them in planning and program and project development.
  - Encourage the development of partner relationships and active participation between Indian tribal governments, STAs, and MPOs, and define the Federal-tribal-State relationship that is appropriate for each Indian Tribe in the State.



**Appendix A: Tribal Consultation Process Letter Agreement between FHWA and ODOT,  
Executed with Concurrence 3/1/19, Expiration 3/1/24 (Superceded by Execution of Guide to  
Tribal Nations – FHWA – ODOT Consultation in Ohio**



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

**Ohio Division**

February 28, 2019

200 North High Street, Room 328  
Columbus, OH 43215  
614-280-6896  
614-280-6876

In Reply Refer To:  
HDA-OH

Jack Marchbanks  
Director  
Ohio Department of Transportation  
1980 West Broad Street  
Columbus, OH 43223

Dear Director Marchbanks:

The Federal Highway Administration (FHWA) and the Ohio Department of Transportation (ODOT) participate in numerous projects which have the potential to impact archaeological sites and/or human remains that have religious or cultural significance to federally recognized Native American Tribal Governments (Tribes). The purpose of this Agreement is to document the processes and procedures acknowledged between FHWA and ODOT in consulting with Tribal governments on Federal-aid highway projects.

Federal law requires government-to-government consultation between the Federal government and the Tribes, which are recognized as sovereign governments. It is FHWA's responsibility to initiate and carry out consultation with Tribes to the greatest extent permitted by law when they may be impacted by potential Federal-aid highway projects. This responsibility may not be officially delegated to the State Departments of Transportation (DOTs). However, FHWA may rely on State DOTs to carry out administrative project specific tasks on behalf of FHWA. FHWA retains responsibility for the overall consultation, including matters at the program or government-to-government levels, conflict resolution, and adherence to all Federal requirements and related laws pertaining to the Federal-aid highway program in Ohio.

There are currently 18 federally recognized Indian Tribes for Ohio, but there are no tribal reservations or tribal lands in the State of Ohio. A current tribal contact list is maintained for each of these Tribes and is included in Attachment 1.

#### NEPA Assignment in Ohio and Tribal Consultation

The Surface Transportation Project Delivery Program (STPDP) authorized under the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), affords DOT the opportunity to assume the responsibilities of FHWA for compliance with the National Environmental Policy Act (NEPA) and related laws. On December 11, 2015, FHWA and ODOT executed the NEPA Assignment Memorandum of Understanding (MOU), effective on December 28, 2015, assigning ODOT the assumption of FHWA's responsibilities for environmental review, resource agency consultation, and other environmental regulatory compliance-related actions pertaining to the review or approval of federal aid transportation projects in Ohio.

Under NEPA Assignment, ODOT, in consultation with the Ohio State Historic Preservation Office (SHPO), is legally responsible for ensuring compliance with Section 106 of the NHPA on Federal-aid transportation projects in Ohio. FHWA will conduct audits of ODOT's program, ensuring that ODOT is acting in accordance with the law. **FHWA will retain responsibility for government-to-government tribal consultation** as set forth in the Constitution of the United States, treaties, statutes, and court decisions. FHWA and ODOT will continue to follow the 2005 tribal consultation protocol as outlined in this Letter agreement (a listing of current procedures for Tribal Consultation for Federal-aid Projects in Ohio is Attachment 2), until a new protocol is established. However, any Tribes may indicate at any time that they prefer to work directly with FHWA.

Background of Tribal Consultation for Federal-aid Projects in Ohio:

ODOT, FHWA and 7 of the 15 federally recognized Tribes met in 2005 to develop a tribal consultation protocol that laid out the process for when and how Tribes were notified of federal aid projects in Ohio. That protocol was formalized in 2014 in a Letter Agreement between the FHWA Ohio Division and ODOT. The protocol was meant to streamline the Section 106 consultation process and allowed ODOT to coordinate directly with the Tribes while clearly indicating FHWA is always available for government-to-government consultation, if requested by a Tribe. The process clarifies for the Tribes the process that ODOT uses to coordinate on Section 106 eligibility, effect, and mitigation, thus improving communication with the Tribes and preventing delays.

These points were included in the development of the Section 106 process in Ohio. To address elements in the National Historic Preservation Act (NHPA), FHWA, ODOT, the Advisory Council on Historic Preservation (ACHP), and the Ohio Historic Preservation Office entered into a Programmatic Agreement in 2011 (most recent version, *Programmatic Agreement among the Federal Highway Administration, the Advisory Council on Historic Preservation, Ohio's State Historic Preservation Office, and the State of Ohio, Department of Transportation Regarding Implementation of the Federal-Aid Highway Program in Ohio*, Agreement No. 19319 Supersedes Agreement No. 16734; executed November 8, 2017), also known as the Section 106 PA, that includes Tribal consultation issues related to the NHPA and in accordance with 36 CFR § 800.3(f)(2). The Section 106 PA contains stipulations to consider the effects of the program on historic properties in Ohio and the stipulations that govern compliance of the program with Section 106 of the NHPA until the agreement expires or is terminated. The sections of interest to the Tribes include responsibilities under NEPA Assignment, consultation with Federally Recognized Tribes, post review discoveries and the treatment of human remains.

The Section 106 PA, and its successors, ensure that FHWA and ODOT will consult with Tribes that attach religious and cultural significance to historic properties in the area of potential effects (APE) of a project and invite them to be consulting parties. Consultation with Indian Tribes follow the protocol described above and updated in this Letter Agreement. For projects following the Section 106 process covered under this PA, ODOT will communicate with the Tribes accordingly using the most current tribal contact list. It is understood that ongoing consultation with the Tribes may lead to modifications of the consultation process with Indian Tribes over time. Any such modifications may be implemented upon mutual consent of FHWA, ODOT's Office of Environmental Services (ODOT-OES) and the affected Tribe.

The agencies met with the Tribes in October 2016 at the Ohio Transportation Tribal Summit to revisit the protocol and ensure ODOT's program was coordinated with the Tribes to a level that the Tribes



desired. Based on these discussions, ODOT has enhanced their electronic NEPA documentation system, EnviroNet, to facilitate better communication and access with and for the Tribes. This update went live in late 2018 and allows the Tribes to establish their own specific user profile. This profile allows them each to access the projects that they are interested in and at the point in the Project Development Process (PDP) that meet their needs. These enhancements were developed in consultation with the Tribes and will ensure that ODOT coordinates every project with the Tribes to the level that each Tribe desires. ODOT has also established a Tribal Liaison position to whom the Tribes can address project specific questions or concerns. The Tribal Liaison works closely with FHWA and the Tribes to maintain a positive working relationship.

ODOT continues yearly meetings with the Tribes and will continue to make modifications to ODOT's EnviroNet to improve tribal coordination and documentation necessary for the Federal-aid highway program.

The Section 106 PA does not account for Tribal consultation conducted outside of the Section 106 process. There are instances where a project requires Tribal consultation to satisfy another law or regulation or the matters at the program or government-to-government levels. Examples of this include the Section 1305 Process under MAP-21 or general stakeholder involvement due to the interest of a project to a Tribe or Tribes. For projects under the Section 1305 process, the FHWA Desktop Procedure and ODOT Project Development Process (PDP) will be followed for communications strategy with the Tribes. In these and other cases not involving Section 106, FHWA is responsible for taking the lead in initiating communication with the Tribe(s).

After initial communication has been established, ODOT may communicate administrative, and project specific tasks on behalf of FHWA with the Tribe(s).

The terminology and guidance for Tribal consultation should be reflective of ODOT's current PDP.

FHWA and ODOT agree to document any communication with the Tribes in the appropriate project file.

This Letter Agreement is valid for a period of five years beginning on the date of the concurrence. This letter agreement will be reviewed upon any changes in how the Tribes desire to consult with FHWA.

Your acceptance of this agreement will be evidenced by your concurrence below.

Sincerely,

  
Laura S. Leffler  
Division Administrator

Enclosure(s)

Enclosure(s)

Concurrence:

Jack Marchbanks  
Ohio Department of Transportation

1 March 2019  
Date

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## Attachment 1

### List of Federally Recognized Tribes in Ohio

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## Attachment 2

### Current Procedures for Tribal Consultation for Federal-aid Projects in Ohio

- ODOT has developed an enhancement to the environmental project documentation system (EnviroNet), which allows tribal representatives to customize a tribal profile and receive notifications and project information based on their preferences.
- This notification system will allow Tribes to customize each of their profiles, so they can tailor-fit what types of projects, location of projects, and at what point in the project development process they want to be notified (via email) and become involved.
- These upgrades also provide the Tribes the opportunity to enter comments and receive responses for each project.
- ODOT will continue to coordinate directly with the Tribes, however, FHWA, as the federal agency responsible for government-to-government tribal consultation, has the ultimate responsibility to conduct formal consultation with Tribes under Section 106.
- If at any time, on any project, a Tribe requests to consult directly with the FHWA Ohio Division office, the FHWA Ohio Division staff member will become the project lead for all such consultation with the Tribe and will always copy the ODOT Tribal Liaison.
- In those situations, the ODOT Tribal Liaison for the project will provide the appropriate project (via the EnviroNet system) materials to the FHWA Ohio Division staff member.
- It is important to note that this system will not replace personal relationships with tribal representatives as this is an important part of tribal consultation.
- ODOT and FHWA will continue to host on-site meetings for the Tribes and agencies to consult on the Federal-aid highway program, projects, concerns, and processes in Ohio.

Even with this system and the tribal liaison, escalation procedures may still be needed and if necessary, ODOT will follow the following escalation procedures for Tribal consultation for federal-aid projects:

- If the Tribes object to ODOT findings, eligibility determinations, effect determinations, or treatment plans, ODOT-OES and FHWA shall review the documentation provided by the Tribe to support its objection and make a reasoned response to the Tribe. ODOT-OES and FHWA will follow the procedures laid out in 36 CFR 800 to resolve any objections.
- For late discoveries, ODOT will follow appropriate late discovery guidelines, which include notifying the Tribes accordingly, and determining if any additional investigations of the site are needed. If the Tribes object to additional investigations, ODOT-OES shall make a reasoned response to the Tribes.
- Under the NEPA Assignment Program, if ODOT and a Tribe are unable to agree, the parties

will follow the dispute resolution processes of ODOT's Programmatic Agreement with FHWA, the Ohio SHPO and the ACHP for Section 106 compliance, unless the Tribe requests government-to-government consultation solely with FHWA.

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**Appendix B: Section 106 Programmatic Agreement, Executed 11/8/2017,  
Amended 7/11/2019, Updated 6/29/23**

**PROGRAMMATIC AGREEMENT  
AMONG THE FEDERAL HIGHWAY ADMINISTRATION,  
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,  
OHIO'S STATE HISTORIC PRESERVATION OFFICE,  
AND THE STATE OF OHIO, DEPARTMENT OF TRANSPORTATION  
REGARDING IMPLEMENTATION OF  
THE FEDERAL-AID HIGHWAY PROGRAM  
IN OHIO  
(Agreement No. 38503)  
(Supersedes Agreement No. 19319)**

WHEREAS, the Federal Highway Administration (FHWA) provides funding assistance to the Ohio Department of Transportation (ODOT) through the Federal-Aid Highway Program (Program) which is subject to Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended (54 U.S.C. 306108), and the implementing regulations 36 CFR §800; and

WHEREAS, the State of Ohio, Department of Transportation (ODOT) administers Federal-Aid Highway Program projects throughout the State of Ohio as authorized by Title 23 U.S.C. 302 and Sections 5501.03, 5501.11 and Chapter 5531 of the Ohio Revised Code (ORC); and

WHEREAS, Title 23 United State Code Section 327 (23 U.S.C. 327) allows the U.S. Department of Transportation (USDOT) Secretary, acting through FHWA, to assign responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA) and other Federal environmental laws to a State Department of Transportation through a Memorandum of Understanding (MOU); and

WHEREAS, ODOT and FHWA entered into a NEPA Assignment Memorandum of Understanding (MOU) concerning the state of Ohio's participation in the Program in which FHWA assigned and ODOT assumed FHWA's responsibilities under NEPA and Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA) and associated implementing regulations at 36 CFR § 800; and

WHEREAS, pursuant to the MOU, ODOT is deemed to be a Federal agency for all Federal-Aid Highway projects it has assumed, and in that capacity ODOT assigned the role of "agency official" to the ODOT Office of Environmental Services (ODOT-OES) for the purpose of compliance with 36 CFR §800, and to provide for effective compliance; and

WHEREAS, the responsibilities of Ohio's State Historic Preservation Officer (SHPO) under Section 106 of the NHPA and 36 CFR 800 are to advise, assist, review, and consult with Federal Agencies as they carry out their historic preservation responsibilities and to respond to Federal Agencies' requests within a specified period of time; and

WHEREAS, ODOT has determined that certain transportation projects constitute "undertakings" as defined in 36 CFR § 800.16(y) which may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places (NRHP); and

WHEREAS, ODOT is committed to the design of transportation systems that: (1) achieve a safe and efficient function in the State of Ohio; (2) avoid, minimize, and mitigate adverse effects on historic properties; (3) respond to the needs of Ohio's citizens and communities, including

strategies that enhance the preservation of historic properties; and (4) are developed in collaboration with stakeholders to fit within the context of their settings; and

WHEREAS, FHWA, SHPO, federally recognized Indian tribes (Indian tribes), and ODOT cooperate in meaningful, long-term planning for the protection of historic properties (in compliance with 36 CFR §800) and, toward that end, desire to: (1) devote a larger percentage of time and energy to identifying transportation-related concerns threatening historic properties; (2) create innovative programs to address those problems; (3) promote the latest technologies in the identification and evaluation of historic properties; (4) provide public education and interpretation when appropriate; (5) provide for long-term planning for and effective stewardship of historic bridges; (6) develop a comprehensive and efficient Section 106 process that would: (a) simplify procedural requirements, (b) eliminate unnecessary paperwork, and (c) reduce the project-by-project review role of SHPO by focusing the time and attention of the SHPO on projects that warrant their oversight and attention; and

WHEREAS, FHWA, as a Federal agency, has a unique legal relationship with Indian tribes as set forth in the Constitution of the United States, treaties, statutes, executive orders, and court decisions, and while an Indian tribe may agree to work directly with ODOT as part of the 36 CFR §800 compliance process, the FHWA remains legally responsible for government-to-government consultation with Indian tribes; and

WHEREAS, FHWA, ODOT, and Indian tribes are developing a tribal consultation guide, which will document the processes for FHWA and ODOT to conduct Section 106 tribal consultation regarding the Federal Aid Transportation Program; and

WHEREAS, FHWA and ODOT agree that ongoing consultation with Indian tribes may lead to modifications of the guide and consultation process with Indian tribes over time; and

WHEREAS, FHWA and ODOT understand that the list of Indian tribes who wish to participate in consultation may change over time based on consultation with those tribes; and

WHEREAS, FHWA and ODOT have provided the following federally recognized Indian tribes that may ascribe traditional religious and cultural significance to historic properties that may be affected by the undertakings covered by this PA an opportunity to review, comment, and be a participant, if desired: Absentee-Shawnee Tribe of Oklahoma, Citizen Potawatomi Nation, Delaware Tribe of Indians, The Delaware Nation, Eastern Shawnee Tribe of Oklahoma, Forest County Potawatomi, Miami Tribe of Oklahoma, Ottawa Tribe of Oklahoma, Osage Nation, Peoria Tribe of Indians of Oklahoma, Pokagon Band of Potawatomi, Turtle Mountain Band of Chippewa Indians, Prairie Band of Potawatomi Nation, Seneca-Cayuga Tribe of Oklahoma, Seneca Nation of Indians, The Shawnee Tribe, Stockbridge-Munsee Community Band of Mohican Indians, Tuscarora Indian Nation, Wyandotte Nation, and the Tonawanda Seneca Nation; and

WHEREAS, FHWA Ohio Division Administrator retains responsibility as “agency official” for environmental review, consultation, and decision-making for projects crossing state lines pursuant to the MOU; and

WHEREAS, this agreement has been developed by FHWA, ODOT, SHPO, Indian tribes, and the ACHP pursuant to the regulations implementing Section 106 of the National Historic Preservation Act; and

WHEREAS, ODOT and FHWA have consulted with SHPO and the ACHP pursuant to 36 CFR § 800.14(b) of the regulations; and

WHEREAS, this amended programmatic agreement supersedes the *Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, the State Historic Preservation Office, and the State of Ohio, Department of Transportation Regarding Implementation of the Federal-Aid Transportation Program in Ohio (Agreement No. 19319, executed November 8, 2017, amended July 11, 2019)*; and

WHEREAS, the Interstate Highway System, except for certain elements identified as exceptional, is exempt from consideration as a historic property under Section 106 by the “Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System,” approved by the ACHP and published in the Federal Register on March 10, 2005 (Vol 70, No. 46). In Ohio, only three individual elements on the Interstate System are subject to Section 106 consideration: (a) the ‘Welcome to Ohio’ arch structure over I-70 in Preble County at the Ohio/Indiana state line (Structure File Number (SFN) 6800087) and (b and c) the I-80 twin bridges on the Ohio Turnpike over the Cuyahoga River in Summit County (SFN 7729642 and SFN 7729618); and

WHEREAS, the *Program Comment* issued by the ACHP on November 2, 2012, Streamlining Section 106 Review for Actions Affecting Post-1945 Concrete and Steel Bridges will be applied to undertakings on common concrete and steel bridges lacking distinction, not previously listed in or determined eligible for listing in the National Register of Historic Places, and therefore exempt from individual consideration under the Section 106 process; and

WHEREAS, in compliance with The Federal Highway Administration’s Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Section 123(f), which required each state to complete an inventory of bridges on and off the Federal-aid system and determine their historic significance, FHWA, SHPO, and ODOT completed and accepted the findings of historic bridge studies completed in the fulfillment of the National Bridge and Tunnel Inventory under Section 23 U.S. Code § 144 (G)(3):

- *The Fourth Ohio Historic Bridge Inventory, Evaluation, and Preservation Plan: Bridge Building Trends in Ohio and the Nation, 1961-1975* (2022)
- *2019 Ohio DOT Stone Highway Culvert Inventory and National Register of Historic Places Eligibility Determinations* (2021)
- *Summary Report for Historic Bridge Management Plans* (2012)
- *Ohio DOT Historic Bridge Inventory Summary and Tables Survey Forms for Eligible/National Register Listed Bridges* (2010)
- *The Third Ohio Historic Bridge Inventory, Evaluation and Management Plan For bridges built between 1951-1960 and the development of Ohio’s interstate highway system* (2004)
- *Concrete Arch Supplement* (1994)
- *The Second Ohio Historic Bridge Inventory, Evaluation and Preservation Plan* (1990)
- *The First Historic Bridge Inventory, Evaluation and Management Plan* (1983); and

WHEREAS, FHWA, SHPO, and ODOT agree that the STURRA inventories are consensus state-wide National Register Determination of Eligibility (DOE) findings based on requirements set forth in 23 U.S.C. § 144 National Bridge and Tunnel Inventory and Inspection Standards (NBI) which requires DOTs to “identify historically significant bridges approaching 50 years of age”.; and

WHEREAS, SHPO and ODOT concurred via letter agreement dated July 11, 2001 that all continuous steel beam and continuous steel girder deck bridges constructed in Ohio after the issuance of standardized plans in 1939 are not eligible for the NRHP and therefore are not subject to consideration as historic properties; and

WHEREAS, ODOT and SHPO agree that the historic status of a bridge may be changed, based on significant new information not known during previous evaluations, the passage of time, or the status of similar type bridges; and

WHEREAS, the signatories of this Agreement consider historic bridges an important component to Ohio’s transportation engineering heritage and historic tourism; and therefore, encourage and support rehabilitation through several Federal-aid programs, e.g., the Transportation Alternatives Program and the Surface Transportation Program, or their successors, provided the appropriate program eligibility criteria are satisfied; and

WHEREAS, the *Exemption From Historic Preservation Review for Electric Equipment* issued by the ACHP and published in the Federal Register on November 2, 2022 (Vol. 87, No. 211) exempts Section 106 review requirements of taking into account the effects of the installation, maintenance, repair, or expansion of electric vehicle supply equipment (EVSE) and Level 1, 2, or charging stations on historic properties when the conditions of the exemptions are applicable; and

WHEREAS, historic bridges are subject to the Section 106 Consultation Process when part of a federal undertaking or approval, except for items listed in Appendix A of this agreement, ODOT will ensure that through ODOT’s Project Development Process (PDP) and Performance Based Project Development (PBPD), all feasible and prudent alternatives to replacement of a historic bridge are explored in the project scoping phase of the undertaking; and

WHEREAS, flexibility in highway design standards recognized by the American Association of State Highway and Transportation Officials (AASHTO) and ODOT will be considered when a historic bridge is part of a federal undertaking or approval; and

WHEREAS, SHPO, Indian tribes and ODOT-OES staff agree that participation in programs and activities related to historic and archaeological preservation are important, SHPO, Indian tribes and ODOT-OES will work collaboratively to establish and promote programs and activities of mutual interest and benefit. Programs and activities should include, but not be limited to, the following: (a) Hosting periodic meetings with preservation-type themes. Themes might include recent National Register listings, updates to ODOT’s processes, examples of difficult eligibility questions as seen in National Register Questionnaires, and other topics of mutual interest; (b) participation in relevant professional conferences and organizations; (c) periodic refresher training provided by the Advisory Council and/or appropriate preservation institutions, subject to funding and course availability; (d) presentation and/or publication of relevant research, project reports, or other cultural resources-related topics. This may include, but is not limited to, publication in peer-reviewed and non-peer-reviewed journals, web articles, and presentations at professional conferences/meetings or to the public; and

WHEREAS, ODOT-OES, Indian tribes and SHPO agree that, through consultation, future thematic studies similar to the Interstate Highway System Exemption and ODOT's Historic Bridge Database may be conducted. Such studies may result in concurrence that certain types of properties are or are not eligible for listing on the NRHP and require no further consultation on eligibility. Such studies may also result in concurrence that that specific properties identified within a thematic study are or are not eligible for listing on the NRHP and no further consultation on eligibility is required; and

WHEREAS, this Agreement sets forth the process by which ODOT will meet its responsibilities with Indian tribes, SHPO, FHWA, and the ACHP under Section 106 of the NHPA and the implementing regulations set forth in 36 CFR §800. For purposes of this Agreement, the definitions for terms appearing in 36 CFR § 800.16 (a) through (y) inclusive shall be employed whenever applicable.

NOW THEREFORE, FHWA, ACHP, SHPO, Indian tribes, and ODOT hereby agree that the review of Federal-aid highway undertakings in the State of Ohio shall be administered according to the following stipulations in order to take into account the effects of the Program on historic properties in Ohio and that these stipulations shall govern compliance of the Program with Section 106 of the NHPA until this agreement expires or is terminated.



## STIPULATIONS

ODOT, as assigned by FHWA under the NEPA Assignment MOU, shall ensure that the following measures are carried out.

### I. **Applicability**

This Agreement shall apply to all undertakings administered under the Federal-Aid Highway Program in Ohio as specified in the NEPA Assignment MOU. Projects with no federal nexus are processed in accordance with Ohio Revised Code 149.53 and the *State Funded and State/Local Funded Project Agreement* between ODOT and SHPO (Revised) (Agreement No. 17075) executed August 29, 2012 (or any successors).

### II. **General Requirements**

In compliance with its assigned responsibilities for compliance with Section 106 of the NHPA and 36 CFR §800, and as a condition of the award of any assistance under the Program to ODOT, ODOT shall carry out the requirements of this Agreement consistent with all applicable FHWA and ACHP policies and guidelines, including the requirements set forth in 36 CFR §800. ODOT commits to the following:

#### (A) **Employment of Qualified Personnel at ODOT**

- (1) For the purpose of implementing this Agreement, ODOT's Office of Environmental Services (ODOT-OES) shall employ permanent professional staff in the fields of History, Archaeology, and Architectural History (or closely related field) who meet the requirements of the Secretary of Interior's Professional Qualifications Standards ([https://www.nps.gov/history/local-law/arch\\_stnds\\_9.htm](https://www.nps.gov/history/local-law/arch_stnds_9.htm)).
- (2) Consultants working on ODOT projects in the fields of History, Archaeology, and Architectural History must be prequalified by ODOT for such work. As such, these employees must meet the requirements of the Secretary of Interior's Professional Qualifications Standards ([https://www.nps.gov/history/local-law/arch\\_stnds\\_9.htm](https://www.nps.gov/history/local-law/arch_stnds_9.htm)).

#### (B) **Employment of Personnel at SHPO**

For the purpose of implementing this Agreement and streamlining the Section 106 consultation process, ODOT will enter into an agreement with the Ohio History Connection every two years, coinciding with the State of Ohio's biennium, to fund two (2) review positions at the SHPO, a division of the Ohio History Connection, or to fund other initiatives agreed upon by SHPO and ODOT. These positions will be filled by individuals who meet the Secretary of Interior's Professional Qualifications Standards ([https://www.nps.gov/history/local-law/arch\\_stnds\\_9.htm](https://www.nps.gov/history/local-law/arch_stnds_9.htm)), the Personnel Qualifications in the SHPO's Archaeology Guidelines (1994) or its successors, and ODOT's prequalification criteria for cultural resources.

#### (C) **Responsibilities**

- (1) ODOT
  - a) ODOT, as the Agency Official for projects assigned under the MOU, has the responsibility for compliance with Section 106 of the NHPA and the requirements of this Agreement with the exception of government-to-government consultation with Indian tribes.

- b) It is ODOT's responsibility to determine the undertaking, establish the Area of Potential Effects, identify and assess effects on historic properties, and conduct Section 106 public involvement and consultation activities.
- c) ODOT's responsibilities under this agreement may not be delegated to project sponsors, other ODOT offices (with the exception of projects that meet the criteria listed in Appendix A of this agreement), or any other party.
- d) ODOT is solely responsible and liable for all project-level Section 106 decisions, with the exception of government-to-government consultation with Indian tribes as detailed in Stipulation IV.
- e) ODOT-OES will assist FHWA with tribal consultation as detailed in Stipulation IV below.
- f) Other actions identified in this agreement.

(2) FHWA

- a) FHWA shall maintain responsibility for government-to-government consultation with federally recognized tribes.
- b) FHWA will retain responsibility as the federal Agency Official for highway projects that cross state boundaries or any project that is adjacent to an international border. Such projects would be subject to review under 36 CFR §800.

(3) SHPO

- a) SHPO's responsibility is to consult with federal and state agencies to determine if undertakings will affect historic properties.
- b) Under this agreement, SHPO will consult with ODOT on federal undertakings to define the APE, identify historic properties, assess effects, and develop mitigation measures. SHPO will participate in consultation with other Section 106 consulting parties.
- c) SHPO's transportation reviewers will work directly with ODOT-OES archaeologists and history/architectural staff throughout the Section 106 consultation process.
- d) Other actions identified in this agreement.

(4) ACHP

- a) The ACHP will be notified of findings of adverse effect by ODOT-OES and will be invited to participate in resolving the adverse effect of an undertaking in accordance with 36 CFR 800.6(a)(1). The Council will notify ODOT-OES whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council will provide written notice to ODOT-OES of its decision to participate.
- b) The ACHP will participate, in accordance with Stipulation VIII(A), in the resolution of disputes that may occur through the implementation of this Agreement.

**(D) ODOT Cultural Resources Manual and procedures**

- (1) ODOT-OES will coordinate with SHPO on proposed substantial changes to ODOT's *Cultural Resources Manual* (2012), and its successor(s).



- (2) ODOT-OES and SHPO will continue to collaborate on and develop standard procedures for conducting various cultural resources-related activities (e.g., establishing boundaries for historic properties, etc.). Standard procedures are identified and discussed as needs are perceived and serve as guidance for all parties. Best practices can be updated as processes and/or circumstances change. The documents are maintained electronically by ODOT-OES.

**(E) Training**

- (1) ODOT-OES has converted most of its environmental training program, including all of its cultural resources classes, to an online format. ODOT-OES provides the following online cultural resources-themed trainings: “Section 106/NRHP” and “Creating Permanent Records of Historic Properties”. These classes are for ODOT staff, consultants, project managers, and local public agencies. Both classes include an online testing component. The classes are offered through ODOT’s Local Technical Assistance Program (LTAP) through their online training system. Participants can register for and take OES’s classes on demand.
  - a) All ODOT environmental staff are required to successfully complete the Section 106/NRHP and Creating Permanent Records of Historic Properties classes and receive a passing grade on the tests (>/= 75%). The classes must be successfully completed every five years.
  - b) All consultants intending to conduct cultural resources work on ODOT transportation projects must also successfully complete the Section 106/NRHP class and receive a passing grade on the test (>/= 75%) to be considered for pre-qualification. Any cultural resources consultants seeking prequalification in History/Architecture must also successfully complete the Creating Permanent Records of Historic Properties class (and receive a passing score). All pre-qualified cultural resources consultants must successfully complete the training every five years in order to maintain their pre-qualified status.
  - c) ODOT shall encourage others who have involvement with ODOT projects, such as local public agencies, other state agencies, and ODOT and consultant project managers, to participate in these classes as well.
- (2) ODOT also conducts a training class on the National Environmental Policy Act (NEPA) process and a class specific to the Categorical Exclusion class of action. These classes are for ODOT staff, consultants, project managers, and local public agencies, and others. The Categorical Exclusion class is exclusively online and requires other environmental classes to be successfully completed as prerequisites. Like the Cultural Resources classes, participants can register for and take the CE class at any time. The NEPA class also requires completion of other environmental classes as prerequisites. This class, however, also includes a two-day in-person or interactive virtual component. This class is typically offered at least twice a year but may be offered more frequently based on demand.
  - a) Both of these classes contain a Section 106 and NRHP training component.
  - b) Both classes have testing components, are requirements for all ODOT environmental staff, and are pre-qualification requirements for consultants who wish to prepare environmental documents. ODOT environmental staff in OES and Districts as well as consultants pre-

qualified to prepare CE documents are required to successfully complete the Categorical Exclusion class every five years. ODOT environmental staff in OES and Districts as well as consultants pre-qualified to prepare Environmental Assessments (EA) and Environmental Impact Statements (EIS) must successfully complete the NEPA course every five years.

**(F) Documentation Requirements**

- (1) ODOT-OES shall coordinate with the SHPO electronically via the EnviroNet system. Transmittal letters will be submitted through the system for non-objection or electronic approval. Additional information will be included in the environmental project file in EnviroNet.
- (2) Coordination with Indian tribes will be conducted through various means based on tribal preferences (mail, email, and/or other types of communication desired by each Tribe) and as outlined in the tribal consultation guide.
- (3) The general public will be afforded the opportunity to comment on projects through the NEPA public involvement process (see ODOT's Public Involvement Manual for NEPA and the PDP or its successors). Specific guidance on NEPA public involvement and Section 106 public involvement can be found in ODOT's Public Involvement Manual for NEPA and the PDP and in ODOT's Cultural Resources Manual.
- (4) Section 106-specific public involvement must be initiated when historic properties may be affected, when public interest in the effects to historic properties is likely, and/or when there may be controversy related to historic properties.
- (5) If Consulting Parties are identified for a project, ODOT-OES shall make information available to the Consulting Parties either electronically or, if requested, in hard copy format.

**III. Historic Bridges**

- (A)** Bridges in ODOT's Historic Bridge Database that have been evaluated as eligible for the NRHP or which are listed in the NRHP, either individually or as a contributing resource to a historic district, are herein referred to as "historic bridges".

**(B) Projects that Involve a Historic Bridge**

On all Federal-aid projects that involve a historic bridge, rehabilitation is the preferred alternative unless demonstrated not to be feasible and a prudent use of public funding. Rehabilitation for vehicular use must be thoroughly evaluated before other alternatives are considered. Rehabilitation alternatives must consider a one-way pair alternative that involves rehabilitating the existing bridge and constructing a new parallel bridge, when applicable. If rehabilitation is not feasible and prudent as determined by ODOT, then bypassing it with an agreement to maintain the bridge, or relocation for another use must also be considered. Please refer to AASHTO's *Guidelines for Historic Bridge Rehabilitation and Replacement* (2008), ODOT's *Ohio Historic Bridge Maintenance and Preservation Guidance* (2010), and National Parks Service's *Guidelines of Rehabilitating Historic Covered Bridges* (2019).

**(C) Change in Historic Status of Bridges**

Bridge eligibility status may change based on new information, passage of time, and change in status of similar type bridges. The process for formalizing changes in eligibility status will be as follows:

- (1) For bridges associated with an ODOT Project Identification Number (PID) (i.e., a current project) the project will be coordinated with SHPO through the Section 106 process and any changes to bridge eligibility will be addressed through that process.
- (2) Bridges not associated with a PID can be elevated from Non-Historic to Eligible (or vice versa) by the following means:
  - a) On an annual basis as part of the compliance review of this agreement and tracked under fulfillment of this stipulation. The database record will be updated by ODOT in conjunction with the annual compliance review meeting in which all of the recommended eligible bridges will be presented at one time. (Example: information submitted by interest groups for consideration).
  - b) New, historical information may also be recorded in the historic bridge database “Notes” field for consideration if a bridge becomes part of a federal undertaking or inventory reevaluation. A notification email will be sent to SHPO, the bridge owner, and Historic Bridge Consulting Parties with the updated inventory form.
  - c) On an annual basis, as part of the compliance review of this agreement, ODOT and SHPO will review the historic bridge database to identify bridges or bridge types that require re-evaluation as a result of new information or changes that have occurred to the historic bridge population over the past year.

**(D) System Preservation and Environmental Stewardship**

- (1) ODOT-OES will work with ODOT’s Office of Structural Engineering, consultants, and bridge owners to identify methods to encourage the preservation of historic bridges (such as management plans, routine maintenance, identification of funding sources, adaptive reuse, etc.).
- (2) ODOT and FHWA will promote routine maintenance, proper treatments of materials, and rehabilitation and reuse, of historic bridges based on guidance established by AASHTO, the National Park Service (NPS), and ODOT’s *Ohio Historic Bridge Maintenance and Preservation Guidance* (2010), and recommendations outlined in ODOT’s Historic Bridge Management Plans.
- (3) ODOT will encourage the use of ODOT’s *Ohio Historic Bridge Maintenance and Preservation Guidance* (2010) (and its successors) for undertakings affecting historic types of bridges, even if they are not eligible for, or listed on the NRHP.
- (4) ODOT will maintain a website that advertises bridges and salvaged bridge components for reuse on roads, multiuse trails, parks, or other applications that will preserve and maintain them.
- (5) ODOT and SHPO will contact parties that may have an interest in reusing historic bridges (e.g., state and local parks; golf courses; multipurpose trails; and municipal and regional planners). Information will be provided on sources of funding to preserve historic bridges such as provisions in 23 USC §144(g)(4)(A) and (B), §144(5)(A)(B), and §144(6)(A). And periodically update them on the structures that are currently available for reuse.

- (6) When ODOT or SHPO are notified of a bridge owner's intent to replace a historic bridge using local government funds and no federal approvals are required, ODOT and SHPO will encourage rehabilitation as partners in the stewardship of Ohio's historic bridges, promoting AASHTO's guidelines, which encourage the use of design exceptions, where applicable, adaptive reuse of the structure if it's not feasible to remain in place. ODOT may offer to advertise the bridge for reuse on its website and recommend documentation before a structure is demolished. ODOT will provide a discussion of how this stipulation was implemented at the annual review.
- (7) ODOT will explore opportunities to incorporate sustainable practices and context-sensitive design elements by reusing existing bridges, structural elements, materials and aesthetics. ODOT will provide a discussion of how this stipulation was implemented at the annual review.
- (8) SHPO and ODOT will present awards for rehabilitation, preservation, reuse, sustainable design, and context sensitive design of historic bridges each year. The recipients of the awards will be selected by a panel of reviewers from each agency and presented at the County Engineers Association of Ohio (CEAO) Ohio Bridge Conference and Trade Show or other annual event. A copy of the bridge awards document will be provided to the ACHP. ODOT will provide a list of awards given in the prior year at the annual review and add them to ODOT's existing Historic Bridge Awards webpage.
- (9) Working in partnership with ODOT's Office of Local Projects, ODOT District staff, and SHPO, ODOT-OES will assist in the facilitation of available reimbursable project costs to preserve historic bridges pursuant to 23 USC § 144(g)(6)(A), and encourage local agencies and bridge owners to apply for available funding to preserve historic bridges; e.g., TAP; Credit Bridge Program; municipal bridge programs; and general bridge funds. ODOT will provide a discussion of how this stipulation was implemented at the annual review.
- (10) ODOT will continue to explore funding sources to apply toward maintenance and preservation of historic bridges, historic bridge research, and bridge update studies. ODOT will provide a discussion of how this stipulation was implemented at the annual review.
- (11) ODOT will explore appropriate events and organizations to share data and promote the ODOT Historic Bridge Inventory's research findings, program objectives, and publicize Ohio's extensive bridge-engineering heritage; e.g., the Ohio Transportation & Engineering Conference (OTEC); the CEAO Ohio Bridge Conference & Trade Show; Professional Engineers' meetings; ODOT District Environmental Coordinator meetings; ODOT training courses; and historical organizations. ODOT will provide a list of activities conducted to fulfill this stipulation at the annual review.
- (12) ODOT will ensure the historic bridge inventory database is updated annually for the compliance review, and made available to the public and partner agencies online.

#### **IV. Consultation with Federally Recognized Indian Tribes**

- (A) As discussed in the preamble of this agreement, while ODOT-OES may consult with tribes, FHWA remains legally responsible for government-to-government consultation with Indian tribes.
- (B) FHWA will engage the tribes by meeting with them annually to continue consultation. For any tribes that are not present at the annual meeting, FHWA will send letters to each tribe, inviting them to consult on any or all projects.

- (C) For all projects that are scheduled to initiate preparation of an EIS, FHWA will initiate consultation with the tribes. FHWA will request the tribes to indicate if they prefer to continue government-to-government consultation, or if they prefer coordination to be carried out by the state, acting on behalf of FHWA.
- (D) After initial contact is made with the tribes as described above, if the tribes do not request government-to-government consultation, as decided during the 2016 Tribal Summit, ODOT-OES will continue coordination with Indian tribes that might attach religious and cultural significance to historic properties in the area of potential effects on behalf of FHWA unless otherwise requested by the tribe. Tribal consultation materials will include both FHWA Ohio Division and ODOT-OES contact information.
- (E) ODOT and FHWA will continue to follow protocols established during the tribal consultation workshop held in 2005 and outlined in the 2014 FHWA/ODOT Letter Agreement on tribal consultation, renewed in March 2019, until such time that a tribal consultation protocol is established through consultation with the tribes.
- (F) For any undertaking, if any Indian tribe or officially designated representative of an Indian tribe requests to consult with FHWA in lieu of, or in addition to ODOT-OES, ODOT-OES shall forward the request to FHWA, if necessary. When an Indian tribe makes such a request, FHWA will consult with that Indian tribe in coordination with ODOT-OES.
- (G) ODOT-OES will maintain an updated list of tribes that wish to be contacted and will update contact information for those tribes as new information becomes available. The list will be available to both ODOT-OES and FHWA in a mutually agreed upon location.

## V. **The Section 106 Process**

For all undertakings conducted pursuant to this Agreement, ODOT, in its role as agency official as assigned in the NEPA Assignment MOU, shall carry out the following requirements:

### (A) **Initiation of Section 106 Process (36 CFR § 800.3)**

During the early stages of Section 106 review, ODOT shall follow the procedures in 36 CFR § 800.3 in order to establish the undertaking, identify consulting parties, coordinate with other reviews, and plan to involve the public.

#### (1) **Establish the Undertaking (36 CFR § 800.3(a))**

ODOT, as the agency official, shall determine whether the proposed Federal action is an undertaking and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

##### a) **No Potential to Cause Effects (36 CFR § 800.3(a)(1))**

Undertakings that have no potential to cause effects to historic properties, pursuant to 36 CFR 800.3(a)(1), are defined as those actions that by their nature, will not result in effects to historic properties. FHWA defines these to be only non-construction related activities. For example, purchasing equipment, planning, and design all fall under this portion of the regulation and do not require any further obligations under Section 106. All other construction activities with a federal nexus must comply with 36 CFR §800. The beginning of Appendix A of this agreement includes a list of project types that have no potential to cause effects.



b) **Potential to Cause Effects**

If an undertaking is a type that has the potential to cause effects, the agency official initiates the Section 106 process as agreed upon and outlined in the Programmatic Agreement.

c) **Plan to Involve the Public and Other Consulting Parties ((36 CFR § 800.3(e-f))**

If the undertaking is a type that has potential to cause effects to historic properties, if present, ODOT shall, through opportunities afforded by the ODOT project development process under NEPA, ODOT's Cultural Resources manual (or its successors) consider the views of the public in a manner that remains consistent with 36 CFR §800.3.

**(B) Identification of Historic Properties (36 CFR 800.4)**

(1) **Determine Area of Potential Effects**

The area of potential effects (APE) is defined by the Section 106 regulations as the “geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking” [36 CFR § 800.16(d)].

In consultation with the SHPO and Indian tribes, ODOT-OES will use a practical approach to define the APE for an undertaking on a project-by-project basis. ODOT considers the following when defining the project's APE: past planning, research, and studies; the context and intensity of the project; anticipated impacts to adjacent properties; results of the Section 106 Records Check and field review; current land use, setting, and built environment; and information provided by the SHPO, federally recognized tribes, and other consulting parties concerning historic resources.

ODOT, SHPO, and Indian tribes recognize that there may be different APEs for different types of historic resources, APEs may change over the life of an undertaking, and APEs may vary from project to project based on the variables noted above. When submittals from ODOT to SHPO and Indian tribes are required, ODOT will include a detailed description of the APE, the information used to determine the APE, and how that information was applied. ODOT's Cultural Resources Manual will include more detailed guidance regarding the importance of APEs, information used in their identification, and appropriate application.

(2) **Identify Historic Properties and Evaluate Historic Significance**

The APE for the undertaking will be defined as described above. ODOT will determine the scope of the efforts needed to identify historic properties based on the APE and associated information. This scope will vary depending on the scope and scale of the project, context, and resources present.

ODOT will determine the level of identification effort on a project-by-project basis. It will be directly related to the APE defined for the undertaking. If ODOT-

OES determines that historic properties would not be affected by the undertaking even if they were eligible for the NRHP, ODOT-OES will document the location of the resources in relation to the APE and no further evaluations will be conducted. If the project changes, additional studies may be warranted.

If the context and intensity of the project is such that it may affect historic properties, if present, adjacent properties will be identified and evaluated for NRHP eligibility in consultation with SHPO and Indian tribes.

- a) Information shall be obtained through cultural resource surveys or other appropriate methods consistent with the provisions of 36 CFR 800.4.
- b) Identification of historic and archaeological properties shall follow Archaeology and Historic Preservation: Secretary of Interior's Standards and Guidelines (48 FR 44716), as well as applicable SHPO and ODOT guidelines and manuals.
- c) Except for properties already determined eligible for listing or already listed in the NRHP, ODOT-OES shall apply the National Register Criteria (36 CFR §63) and shall make an appropriate finding regarding eligibility.
- d) For properties that are determined by ODOT-OES not to be eligible for inclusion in the NRHP in consultation with SHPO and Indian tribes, no further review shall be required provided that any objection to ODOT-OES' determination raised by either SHPO, the Tribes, or consulting parties is resolved in accordance with 36 CFR § 800.4(c)(2).

**(3) Public Involvement when Undertakings Have the Potential to Effect Historic Properties**

- a) Since concerns regarding historic properties can be identified during NEPA Public Involvement activities, ODOT will incorporate Section 106 Public Involvement into NEPA Public Involvement opportunities.
- b) Additional public involvement may be warranted to consult with the public and/or consulting parties (including Indian tribes) to identify, determine eligibility, assess effects, and resolve adverse effects on historic properties (see ODOT's 2020 Public Involvement Manual for NEPA and the Project Development Process (or subsequent versions) and ODOT's 2012 Cultural Resources Manual (or subsequent versions).
- c) The 2016 AASHTO publication Practitioner's Handbook 06: Consulting Under Section 106 Of The National Historic Preservation Act (and any related successors to those guidelines), as well as relevant information guidance provide by the ACHP and the National Park Service, shall be used for reference and guidance in developing consultation materials for use with both the public and Section 106 consulting parties.

**(C) Determining Effects on Historic Properties**

**(1) Finding of Minimal Potential to Cause Effects**

- a) ODOT-OES and SHPO have jointly concurred that the lists of project types/actions in Appendices A and B have minimal potential to cause effects to properties eligible for or listed on the NRHP. Application of Appendices A and B:

1. *Appendix A:*

- a. Appendix A lists activities that are not required to be submitted to ODOT-OES or SHPO by the District environmental staff. The beginning of Appendix A includes a list of project types that have no potential to cause effects to historic properties) based on FHWA's definition. The remainder of Appendix A consists of a list of projects that have a minimal potential to cause effects to historic properties. Projects on this list are limited to the activities defined within the appendix and based on the signatories' past experience with similar actions will not result in any significant impacts to historic properties.
- b. To be applicable, an undertaking must be limited entirely to any one or a combination of the actions specified in Appendix A. These projects cannot require permanent right-of-way and cannot involve impacts to historic properties or historic districts.
- c. By referencing Appendix A of this Agreement, the ODOT District environmental staff may make a determination that an undertaking is a type of activity(ies) which has a "minimal potential to cause effects" to historic properties. However, districts work in consultation with ODOT-OES cultural resources staff as necessary.
- d. When appropriate, supporting documentation for findings under Appendix A shall be recorded in the appropriate electronic project file of the EnviroNet system (see ODOT's 2021 *NEPA File Management and Documentation Guidance* or its successors).
- e. If desired, a federally recognized Indian tribe may choose to receive notification of these projects.

2. *Appendix B:*

- a. Appendix B of this agreement lists activities that require coordination with ODOT-OES to determine that there will be no impacts to historic properties. However, no coordination with the SHPO is required for project types on this list.
- b. To be applicable, an undertaking must be limited entirely to any one or a combination of the actions specified in Appendix B.
- c. By referencing Appendix B of this Agreement, ODOT-OES Cultural Resources staff may make a determination that an undertaking is a type of activity(ies) which has a "minimal potential to cause effects" to historic properties.
- d. Supporting documentation for findings under Appendix B shall be recorded in the appropriate environmental document, citing this stipulation of this Agreement [Stipulation V(C)] and included in the appropriate electronic project file of the EnviroNet system.
- e. If desired, a federally recognized Indian tribe may choose to receive notification of these projects.



**(2) Finding of No Historic Properties Affected**

- a) If the project is not limited to activities defined in Appendix A or B and if ODOT-OES finds that there are either no historic properties present within the APE or historic properties are present, but the undertaking will have no effect on them as defined in 36 CFR § 800.16(i), ODOT-OES shall make a finding of “no historic properties affected” (36 CFR § 800.4(d)(1)) and specify any commitments that shall be imposed to secure that finding. In general, ODOT-OES shall ensure documentation as set forth in 36 CFR § 800.11(d) is prepared to support the finding and included in the project file.
  - 1. ODOT-OES notifies the SHPO, via EnviroNet, and Indian tribes, as appropriate, that a finding of No Historic Properties Affected has been made.
    - a. If the SHPO objects or comments within 15 days of notification of the ODOT-OES finding or if Indian tribes object or comment within 30 days of notification of the ODOT-OES finding, ODOT-OES, SHPO, and Indian tribes will consult to resolve the objection or comment.
    - b. If SHPO or Indian tribes do not respond by the end of the review period, then ODOT-OES may proceed.

**(3) Finding of No Adverse Effect**

- a) For any undertaking that includes within the APE, NRHP listed or eligible properties that will not be adversely affected by the undertaking, as defined by the Criteria of Adverse Effect set forth in 36 CFR § 800.5(a), ODOT-OES shall make a finding of “no adverse effect” and specify those commitments, if any, that shall be imposed to secure that finding.
- b) In general:
  - 1. ODOT-OES may consult at any time, either formally or informally, with SHPO and Indian tribes regarding application of the criteria.
  - 2. ODOT-OES shall ensure the supporting documentation for the finding, as set forth in 36 CFR § 800.11(e), is completed.
  - 3. ODOT-OES shall upload the finding of no adverse effect to the EnviroNet system and notify the ODOT district office, SHPO and Indian tribes. ODOT will notify Consulting Parties and interested members of the public that this finding of no adverse effect has been made. ODOT will clearly communicate the length of review periods to Consulting Parties, which will typically be consistent with the length SHPO’s review period (15 or 30 days). ODOT-OES recognizes the Indian tribes have 30 days to provide comments or questions and will honor that requirement.
  - 4. ODOT shall include a record of that finding in the annual report prepared pursuant to Stipulation VI of this Agreement.
  - 5. If neither SHPO, Indian tribes, nor a consulting party objects within the review period, ODOT-OES may proceed with the undertaking as proposed.
  - 6. If the ACHP has chosen to participate in the consultation the ACHP may provide a written opinion commenting on or objecting to the finding within the 15-day review period. ODOT-OES shall then

take into account the ACHP's opinion in reaching a final decision on the finding.

7. If the SHPO, Indian tribes, or any other consulting party objects or comments within the review period of an ODOT-OES finding of "no adverse effect", ODOT-OES, SHPO, and Indian tribes will consult to resolve the objection or comment and may review the finding pursuant to 36 CFR § 800.5(c)(3)(ii) of the Section 106 regulations.
- c) When conditions are imposed to uphold a No Adverse Effect finding:
  1. If there are any conditions imposed to secure the "no adverse effect" finding, then ODOT-OES shall upload to EnviroNet a formal letter to SHPO and Indian tribes, as applicable, including a signature line for concurrence with a 15-day review specifying, in detail, the condition(s).
  2. ODOT-OES shall notify consulting parties and interested members of the public of the finding. ODOT will clearly communicate the length of review periods to Consulting Parties, which will typically be consistent with the length SHPO's review period (15 or 30 days).
  3. ODOT-OES shall ensure that the condition(s) have been fulfilled as part of the project implementation.
  4. Upon completion/implementation of a condition, ODOT-OES shall provide the appropriate documentation to SHPO and Indian tribes indicating that the condition/commitment has been fulfilled. If the original condition is written such that it requires a response from SHPO, the transmittal in EnviroNet will prompt the SHPO to concur with the transmittal. If the original condition does not require a response from SHPO, the transmittal will not prompt the SHPO for concurrence. ODOT-OES recognizes the Indian tribes have 30 days to provide comments or questions and will honor this requirement.

**(4) Finding of Adverse Effect**

- a) For any undertaking that includes within the APE, NRHP listed or eligible properties that will or may be adversely affected by the undertaking, as defined by the Criteria of Adverse Effect set forth in 36 CFR § 800.5(a), ODOT-OES shall make a finding of "adverse effect". ODOT-OES shall upload the finding to the EnviroNet system and notify the ODOT district office, SHPO and Indian tribes. ODOT will notify Consulting Parties and interested members of the public that the finding of adverse effect has been made.. The correspondence will state that there is a 30-day review period and prompt SHPO for concurrence. ODOT will comply with 36 CFR § 800.5 and 800.6 as laid out in the regulations.
- b) National Historic Landmarks
  1. If ODOT-OES determines that an undertaking may adversely affect a National Historic Landmark, ODOT-OES shall request the SHPO, the ACHP and the Secretary of the Interior to participate in consultation to resolve any adverse effects, as outlined in 36 CFR § 800.10.
- c) Failure to resolve Adverse Effects
  1. If there is a failure to resolve adverse effects or ODOT-OES is unable to execute an MOA pursuant to 36 CFR § 800.6(c), ODOT-OES will request ACHP comment in accordance with 36 CFR § 800.7.

## **VI. Monitoring/Reporting**

- (A)** ODOT-OES and SHPO shall meet annually to evaluate the agencies' joint functioning under the Agreement. FHWA, Indian tribes, and ACHP will be invited to participate in these annual meetings if they so choose.
- (B)** Prior to the annual evaluation, ODOT-OES shall prepare a report of the activities conducted under this agreement during the review year. The report will be made available to SHPO, FHWA, Indian tribes, and ACHP at least 30 days prior to the meeting. This report shall include, but is not limited to,
  - (1) a table identifying all undertakings and specifying project names (i.e., county, route, section and project identification numbers), towns, any other pertinent information, and all findings pursuant to 36 CFR §800 that were processed by ODOT-OES during the year under review pursuant to this Agreement.
  - (2) a reporting of ODOT's efforts related to historic bridges and ODOT's historic bridge program as described in Stipulation III (C and D) during the year under review.
  - (3) any other information that is requested by FHWA, SHPO, or the ACHP.
- (C)** As part of the annual review and at any other time SHPO and ODOT will identify special needs that could be addressed through programs and activities and activities of mutual interest and benefit. ODOT and SHPO will jointly prioritize these needs and establish a yearly workplan to address them. The previous year's workplan will be evaluated at each annual review to assess the status and success of tasks and identify new activities to be completed for the following year.
- (D)** Following the annual review meeting ODOT-OES will submit meeting minutes summarizing the results of the annual review.
- (E)** The updated Historic Bridge Database is provided publicly online via ODOT's website.

## **VII. Additional Provisions**

### **(A) Emergency Situations**

- (1) In accordance with 36 CFR § 800.12(a), this section lays out the procedures for taking into account historic properties during operations that respond to a disaster or emergency declared by the President or the Governor of the State of Ohio or which respond to other immediate threats to life or property.
- (2) FHWA defines Emergency Repairs as repairs undertaken during or immediately after a disaster to restore essential traffic, to minimize the extent of damage, or to protect remaining facilities.
- (3) To qualify as an Emergency Relief project, an approved Damage Survey Report (DSR) must be completed and approved by FHWA. After a DSR has been approved by FHWA, the State is authorized to proceed with any necessary design, right-of-way acquisition or construction. Any necessary agency coordination may occur after the repair work has been completed. If possible, ODOT will conduct agency coordination prior to construction; however, because

- of the nature of this program, this may not be possible.
- (4) ODOT is responsible for appropriate Section 106 documentation. This shall be embodied in an appropriate NEPA Action, where ODOT has assumed the responsibilities of FHWA pursuant to NEPA Assignment. ODOT shall provide FHWA verification of the NEPA approval for the emergency project.
  - (5) The work required to restore the damaged facility to its original condition that is beyond the scope of Emergency Repair will comply with the procedures in Stipulation IV of this Agreement. In these situations, ODOT-OES may request an expedited review by the SHPO, consulting parties (including Indian tribes), and the public.

**(B) Post-review Discoveries**

- (1) Discoveries Made Prior to Project Construction:
  - a) If previously unidentified archaeological or historic properties, or unanticipated effects, are discovered after ODOT-OES has completed a good faith effort to identify properties and carry out its review under this Agreement and prior to commencement of project construction, ODOT-OES, in consultation with SHPO and Indian tribes, shall carry out the applicable requirements of 36 CFR § 800.13 and the ACHP need not be notified unless they participated in the project originally or at the request of Indian tribes or consulting parties.
- (2) Discoveries Made After Project Construction Begins:
  - a) If previously unidentified archaeological or historic properties, or unanticipated effects on such properties, are discovered after project construction begins, that portion of the project will stop immediately pursuant with Section 203.04 of ODOT's Construction and Material Specifications (and any successors to those specifications).
  - b) The project engineer will immediately contact ODOT-OES and/or the appropriate ODOT District Environmental Coordinator. FHWA will be notified if consultation with federally recognized tribes is warranted. If a person or entity other than the project engineer (e.g., a local resident) reports the discovery, the notified entity will notify the project engineer, ODOT-OES, and the ODOT District Environmental Coordinator immediately. The project engineer will stop work immediately. No further construction within 100 feet of the discovery will proceed until the requirements of 36 CFR § 800.13 have been satisfied, including consultation with consulting parties and/or Indian tribes that may attach traditional cultural and religious significance to the discovered property, as appropriate.
  - c) Within two business days ODOT-OES shall assess the discovery and if it is determined to be potentially eligible, provide notification to SHPO, FHWA, consulting parties, and Indian tribes, as appropriate. Notification shall include, to the extent such information is available: description of the nature and extent of the property or properties, assessment of NRHP eligibility of any properties, the type and extent of any damage to the property, the proposed action, any prudent and feasible treatment measures that would take any effects into account, and a request for comments.
  - d) Should any of the notified parties respond with comments within three business days of the initial notification of the discovery or indicate that they wish to be involved in resolving the situation, ODOT-OES shall take

into account their comments or continue consultation with any commenting parties. ODOT-OES shall determine the time frame for any further consultation, taking into account the qualities of the property, consequences of construction delays, and interests of the parties. Following the conclusion of any further consultation, ODOT-OES shall take all comments received into account and may carry out actions to resolve any effects. Failure of any notified party to respond within three business days of notification shall not preclude ODOT from proceeding with their proposed actions.

**(C) Treatment of Human Remains**

It is the preference of FHWA and ODOT to avoid impacts to human remains by preserving them in place whenever possible. In the event that human remains are discovered at any point during an undertaking, FHWA and ODOT are committed to treating them with the utmost respect and dignity at all times.

- (1) Historic and prehistoric human remains are subject to protection under ORC Sections 2909.05 and 2927.11. As such, if previously unidentified human remains are discovered at any point during an undertaking (during environmental studies, pre-construction activities, or construction), work within 100 feet of the discovery will stop immediately.
  - a) The remains will be covered and/or protected in place in such a way that minimizes further exposure of and damage to the remains.
  - b) The ODOT project manager or project engineer will immediately consult with the ODOT District Environmental Coordinator and the ODOT-OES Cultural Resources Section, and immediately notify local law enforcement and/or the County Coroner and FHWA.
  - c) If the project has had a US Army Corps of Engineers (USACOE) permit issued, the ODOT District Environmental Coordinator must notify the ODOT-OES Permits Section and the USACOE.
- (2) If the remains are found to be of American Indian origin, ODOT-OES will immediately (but not longer than 48 hours), contact federally recognized Indian tribes and develop a treatment plan with Indian tribes in accordance with the tribal consultation guide developed by FHWA, ODOT, and federally recognized tribal partners.
  - a) Avoidance and preservation in place is the preferred option for treating human remains.
  - b) If avoidance and preservation in place is not possible, FHWA and ODOT-OES will ensure that any agreed upon treatment and reburial plan is fully implemented.
- (3) If the remains are not of American Indian origin, the appropriate local authority will be consulted to determine final disposition of the remains.
  - a) Avoidance and preservation in place is the preferred option for treating human remains.
  - b) If avoidance and preservation in place is not possible, ODOT-OES will ensure that any agreed upon treatment and reburial plan is fully implemented.
- (4) For human remains of American Indian origin discovered on federal lands, the federal land managing agency will be responsible for consultation under the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) (PL 101-601).



- (5) For human remains discovered on property owned by the State of Ohio, ODOT will comply with Section 149.53 of the ORC.
  - a) Under this section, the Director of the Ohio History Connection shall determine the final disposition of any discovered human remains.

## **VIII. Administrative Provisions**

### **(A) Dispute Resolution**

- (1) Should any signatory to this agreement object in writing to the manner in which the terms of this Agreement are carried out, ODOT will notify the other signatories of the objection and proceed to consult with the objecting party to resolve the objection. ODOT will honor the request of any signatory to participate in the consultation and will take any comments provided by such parties into account. ODOT shall establish a reasonable timeframe for such consultations. Should any signatory object to an ODOT determination of eligibility and resolution cannot be attained, ODOT will submit the determination to the Keeper of the National Register of Historic Places for resolution.
- (2) If the objection is resolved through consultation, ODOT may authorize the disputed action to proceed in accordance with the terms of such resolution.
- (3) If ODOT determines that the objection cannot be resolved despite initiation of such consultation, ODOT shall forward all documentation relevant to the objection to the ACHP and other signatories, including ODOT's proposed response to the objection. Within 30 days after receipt of all pertinent documentation, ACHP shall exercise one of the following options:
  - a) Advise ODOT that ACHP concurs in ODOT's proposed response to the objection, whereupon ODOT will respond to the objection accordingly; or,
  - b) Provide ODOT with recommendations, which ODOT shall take into account in reaching a final decision regarding its response to the objection; or,
  - c) Notify ODOT that the objection will be referred for comment pursuant to 36 CFR 800.7(a)(4) and proceed to refer the objection for comment. In this event, ODOT shall ensure that the Agency Official is prepared to take the resulting comments into account in accordance with 36 CFR 800.7(c)(4).
- (4) Should ACHP not exercise one of the foregoing options within 30 days after receipt of all pertinent documentation, ODOT may assume ACHP's concurrence in its proposed response to the objection.
- (5) ODOT shall take into account any ACHP recommendation or comment and any comments from the other signatories to this Agreement in reaching a final decision regarding the objection. ODOT's responsibility to carry out all actions under this Agreement that are not the subjects of the objection shall remain unchanged.
- (6) ODOT shall provide all other signatories to this Agreement with a written copy of its final decision regarding any objection addressed pursuant to this Stipulation.
- (7) ODOT may authorize any action subject to objection under this Stipulation to proceed, provided the objection has been resolved in accordance with the terms of this Stipulation.
- (8) At any time during implementation of the terms of this Agreement, should any consulting party or member of the public raise an objection in writing pertaining to such implementation to any signatory to this Agreement, that signatory shall

immediately notify ODOT. ODOT shall immediately notify the other signatories in writing of the objection. Any signatory may choose to comment on the objection to ODOT. ODOT shall establish a reasonable time frame for this comment period. ODOT shall consider the objection, and in reaching its decision, ODOT will take all comments from the other parties into account. Within 15 days following closure of the comment period, ODOT will render a decision regarding the objection and respond to the objecting party. ODOT will promptly notify the other parties of its decision in writing, including a copy of the response to the objecting party. ODOT's decision regarding resolution of the objection will be final. Following the issuance of its final decision, ODOT may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

**(B) Amendment**

- (1) This Agreement may be amended when such an amendment is agreed to in writing by all signatories.
- (2) The amendment will be effective on the date a copy signed by all of the signatories is filed with the ACHP.

**(C) Right to Terminate**

- (1) Any signatory to this Agreement may terminate it by providing written notice to the other parties explaining the reasons for proposing termination. The signatory shall consult for not more than 30 days to seek alternatives to termination.
- (2) In the event of termination, the ODOT shall comply with 36 CFR §800 with regard to the individual undertakings covered by this Agreement.

**(D) Duration**

- (1) This Agreement shall take effect upon execution by all signatories and will remain in effect for a period of five (5) years after the date it takes effect, unless it is terminated prior to that time. At least ninety days prior to the conclusion of the five-year period, ODOT will notify all parties in writing. If there are no objections from consulting parties, an amendment with signature pages will be circulated to all signatories and, once all signatories have signed the extension amendment, the Agreement shall then be extended for an additional five years.
- (2) If any party objects to extending the Agreement, or proposes amendments, ODOT will consult with the parties to consider amendments or other actions to avoid termination.

**PROGRAMMATIC AGREEMENT  
AMONG THE FEDERAL HIGHWAY ADMINISTRATION,  
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,  
THE STATE HISTORIC PRESERVATION OFFICE,  
AND THE STATE OF OHIO, DEPARTMENT OF TRANSPORTATION  
REGARDING IMPLEMENTATION OF  
THE FEDERAL-AID HIGHWAY PROGRAM  
IN OHIO  
(Agreement No. 38503)**

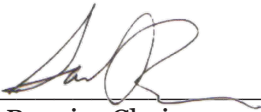
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Execution and implementation of this Agreement (No. 38503) evidence that the ODOT, when acting as the Agency Official, has afforded the ACHP a reasonable opportunity to comment on the Program and its individual undertakings in Ohio and that ODOT has taken into account the effects of the Program and its individual undertakings on historic properties, and that ODOT has complied with Section 106 of the NHPA and 36 CFR §800 for the Program and its individual undertakings.

**The parties hereby acknowledge and reaffirm their commitment to perform all duties set forth in this Agreement.**

\*\*\*\*\*

**ADVISORY COUNCIL ON HISTORIC PRESERVATION**

  
\_\_\_\_\_  
Sara Bronin, Chairman

6.29.2023  
\_\_\_\_\_  
(Date)



**PROGRAMMATIC AGREEMENT  
AMONG THE FEDERAL HIGHWAY ADMINISTRATION,  
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\*\*\*\*\*

**FEDERAL HIGHWAY ADMINISTRATION**

ERIC HOWARD ROSS

Digitally signed by ERIC HOWARD  
ROSS  
Date: 2023.06.07 14:51:17 -04'00'

6-7-2023

Eric Ross, Acting Division Administrator

(Date)

**PROGRAMMATIC AGREEMENT  
AMONG THE FEDERAL HIGHWAY ADMINISTRATION,  
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\*\*\*\*\*

**STATE HISTORIC PRESERVATION OFFICE**

  
\_\_\_\_\_  
Mary Beth Hirsch, Acting Director  
State Historic Preservation Officer

  
\_\_\_\_\_  
(Date)

**PROGRAMMATIC AGREEMENT  
AMONG THE FEDERAL HIGHWAY ADMINISTRATION,  
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,  
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**The parties hereby acknowledge and reaffirm their commitment to perform all duties set forth in this Agreement.**

\*\*\*\*\*

**OHIO DEPARTMENT OF TRANSPORTATION**

*Jack Marchbanks-TMH*  
Jack Marchbanks, PhD, Director

6/1/2023

(Date)

## **APPENDIX A**

### **Agreement No. 38503**

#### **Undertakings with No Potential to Cause Effects**

Undertakings that have no potential to cause effects to historic properties, pursuant to 36 CFR 800.3(a)(1), are defined as those actions that by their nature, will not result in effects to historic properties. These include only non-construction related activities such as purchasing equipment, planning, and design and do not require any further obligations under Section 106. All other construction activities with a federal nexus must comply with 36 CFR 800.

Examples include but are not limited to:

1. Activities which do not involve or lead directly to construction, such as planning and technical studies; grants for training; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system. Examples include:
  - Study type projects (i.e., feasibility studies, etc.).
  - Land donations to ODOT associated with ROW permits (non-NHS/non-Limited Access right-of-way).
  - Early right-of-way acquisition in accordance with 23 CFR 710.501(e).
2. Activities included in the State's "highway safety plan" under 23 U.S.C. 402.
3. Transfer of Federal lands pursuant to 23 U.S.C. 107(d) and/or 23 U.S.C. 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review.
4. Acquisition of scenic easements such as:
  - Conservation/mitigation easements and fee simple.
  - Land acquisition by a public agency/public park entity for passive recreational use.
5. Determination of payback under 23 U.S.C. 156 for property previously acquired with Federal-aid participation.

#### **Minimal Potential to Cause Effects to Historic Properties That May be Processed by ODOT District Environmental Staff**

ODOT-OES and SHPO have jointly concurred that the following list is comprised of project actions that have minimal potential to cause effects to historic properties. Projects are limited to the activities defined in Appendix A, based on the signatories' past experience with similar actions, will not result in any significant impacts to the human or natural environment.

In accordance with Stipulation V(C)(1) of this Agreement, an ODOT district office may determine that an undertaking will not require coordination with ODOT-OES or the SHPO if the undertaking only involves activities as defined in Appendix A. To be applicable, an undertaking must be limited entirely to any one or a combination of the actions specified below. The Cultural

Resources manual includes documentation procedures that must be followed.

These undertakings do not have to be coordinated with or reviewed by ODOT-OES. **These projects cannot involve permanent right-of-way acquisition or impacts to historic properties or historic districts.**

1. Approval of utility installations along or across a transportation facility.
2. Construction of bicycle and pedestrian lanes, paths, and facilities. Examples include:
  - Walkways, sidewalks, shared-use paths, and facilities (i.e. construction of a bike path on an existing railroad bed, designations of certain highways as bike routes, painting of existing paved shoulders as bike lanes, pedestrian crossing safety (Rapid Flashing Beacon or HAWK signals), ADA ramps and other ADA compliant devices, etc.) provided that no new disturbance will occur.
3. The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction. Examples include:
  - Maintenance and/or replacement of existing noise wall panels and/or posts.
4. Landscaping that does not involve new ground disturbance. Examples include:
  - Herbicidal spraying.
  - Mowing or brush removal/trimming projects.
  - Beautification or facility improvement projects (i.e., landscaping, curb and gutter replacement, installation of park benches, decorative lighting, etc.).
  - Planting pollinator habitat.
5. Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur. Examples include:
  - The installation or maintenance of signs, pavement markings/raised pavement markers/sensors, traffic calming activities, and/or new or replacement fencing (right-of-way, vandal, etc.).
  - General pavement marking or "line painting" projects.
  - General pavement maintenance projects such as mill and fill that do not extend to full depth replacement.
6. The following actions for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121):
  - a. Emergency repairs under 23 U.S.C. 125; and
  - b. The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:

- i. Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and
    1. Is commenced within a 2-year period beginning on the date of the declaration.
7. Improvements to existing rest areas and truck weigh stations. Examples include:
  - Improvements to existing rest areas and weigh stations for minor maintenance (e.g., mill and resurfacing of existing parking areas, installation or maintenance of signs, general pavement markings, landscaping, or other project task consistent with Appendix A of this agreement). Projects involving major construction may require a higher level of documentation.
  - Truck stop electrification and construction/installation of alternative energy facilities (CNG, solar, electric vehicle supply equipment [EVSE], etc.) at existing facilities.
8. Ridesharing activities. Examples include:
  - Transportation corridor fringe parking facilities, park-and-ride lots and ridesharing activities.
9. Alterations to facilities or vehicles in order to make them accessible for older adults and people with disabilities.
10. Track and railbed maintenance and improvements when carried out within the existing right-of-way. Examples include:
  - Track and railbed acquisition.
11. Modernization of a transportation, transit, or intermodal facility within its existing property boundaries for minor maintenance (e.g., mill and resurfacing of existing parking areas, installation or maintenance of signs, general pavement markings, landscaping, or other project task consistent with Appendix A of this agreement). Projects involving major construction may require a higher level of documentation.
12. Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.
13. Installation of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. Examples include:
  - Replacement of existing or installation of new traffic signals, flashing beacons, railroad warning devices and the installation of ITS system components.
  - Installation of dynamic message signs, hard shoulder running signage, variable speed limit signs, etc.
14. Upgrade of existing tower lighting to new technologies that ensure a lesser impact than the current system.
15. Installation of automated vehicle infrastructure, etc.



16. Implementation of other new safety or operations technologies (must be approved by OES).
17. Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. Examples include:
  - Tower lighting within the existing operational right-of-way.
  - Guardrail installation and replacement (including median cable barriers) where roadway ditches and backslopes will not be relocated.
  - Environmental mitigation activities within existing operational right-of-way.
18. Work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals within existing operational right-of-way.
19. Construction of alternative energy facilities (fuel tank farms, wind turbines, EVSE, etc.).
20. Projects that receive less than \$5,267,324.01 of Federal funds **or** with a total estimated cost of not more than \$31,603,944.06 (or as amended) **and** with Federal funds that comprise less than 15 percent of the total estimated project cost. ***Reminder:*** **must** be within the existing right-of-way and **cannot** have impacts on historic properties or historic districts.
21. Localized geotechnical and other investigations to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archaeological investigations for archaeology resources assessment or similar survey; and wetland surveys. (This only applies to stand alone projects, not for environmental surveys being conducted as part of a project with an environmental document).
22. Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility Examples include:
  - Related environmental mitigation activities (wetland, stream, upland, etc.).
23. Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes). Examples include:
  - Joint or limited use of right-of-way where the proposed use would have minimal or no adverse social (including highway safety), economic or environmental impacts.
  - Installation of new noise walls and other new noise mitigation projects.
  - Construction of highway safety and truck escape ramps.
  - Installation of traffic signals and lighting.
24. Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, lane reduction (“road diet”), traffic calming measures, and railroad projects that close at-grade crossings to improve safety or traffic operations.
25. Rehabilitation, reconstruction, or replacement of non-historic bridges or culverts.
26. Sustainability initiatives in areas of previously disturbed state-owned property or within previously disturbed existing highway right-of-way, including but not limited to repair,

maintenance, and installation of rain gardens/vegetated biofilters/bio-cells, Truck Stop Electrification, EVSE, small wind turbines, solar panels or arrays, and pavement based kinetic energy collectors.

27. Activities that do not utilize federal monies or require federal actions. \*

\*Projects with only State funding will be processed under the applicable state-funded letter agreement between ODOT and SHPO.



## APPENDIX B

### Agreement No. 38503

#### **Undertakings with Minimal Potential to Cause Effects to Historic Properties That Must be Coordinated with ODOT-OES**

ODOT-OES and SHPO have jointly concurred that the following list is comprised of project types that have minimal potential to cause effects to properties eligible for or listed on the NRHP. In accordance with Stipulation V(C)(1) of this Agreement, ODOT-OES may determine that an undertaking will require no coordination with the SHPO if the undertaking only involves activities as defined in Appendix B.

To be applicable, an undertaking must be limited entirely to any one or a combination of the actions specified below. Actions described in Appendix A that exceed the thresholds listed in Appendix A can be cleared under Appendix B.

*A records check of known historic properties and historic districts must be conducted prior to application of Appendix B.*

#### **These undertakings MUST be coordinated with and reviewed by ODOT-OES.**

##### **Highway & Roadway Improvement Project Types**

1. Modernization and general highway maintenance **that requires additional highway right-of-way or easement**, and which is **not within the boundaries of a historic property or district**, including:
  - (a) Areas where the work is an in-kind replacement of modern facilities including driveway reconstruction, re-installation of utilities, grading to re-establish slopes, seeding and ditch enclosure, driveway underdrain installations and replacements.
  - (b) Urban roadway upgrades and widening projects that are less than a full travel lane in width and no buildings directly involved or removed.
  - (c) Providing driveway and street connections.
  - (d) Improvements to interchanges and divided highways.
  - (e) Enhancement/beautification projects, including but not limited to, landscaping, street tree planting, decorative pavers, decorative street lighting, and traffic calming measures.
  - (f) Installation, repair and maintenance of solar, alternative energy devices and EVSE.
  - (g) Placement of riprap and/or other erosion control measures to prevent erosion of waterway banks and bridge piers provided no excavation is required.
  - (h) Installation of erosion, drainage or flood control measures requiring new right-of-way from areas no more than 15 feet wide immediately adjacent to the feature to be improved provided no deep excavation is required.
  - (i) Slip repair projects, rural widening projects, and relocation projects where the proposed right-of-way where natural soil deposits have been removed such as former surface mining areas; reclaimed strip mine lands; construction borrow areas, or vacant ground in failed slope and/or in slope greater than 15 degrees.
  - (j) Installation/replacement of retaining walls.
  - (k) Work related to a limited access highway permit for improvements/maintenance.
  - (l) School safety crossing installations/modernization.
  - (m) Installation or modernization of pedestrian facilities to improve safety, walkability,

or access to transit facilities including bikeways, such as Safe Routes to School projects.

2. Installation, replacement, restoration, rehabilitation, and/or maintenance **within a historic district or historic property where no new permanent right-of-way will be acquired and no contributing components will be removed or altered**, including:
  - (a) ADA ramps and ADA compliant devices
  - (b) Existing sidewalks and curbs (i.e., in-kind).
  - (c) Asphalt repair/paving.
  - (d) Existing traffic signals including replacement with mast arms.
  - (e) Modern transportation signage;
  - (f) Pedestrian safety devices and any non-permanent facilities (e.g., bicycle racks, trash receptacles, Rapid Flashing Beacons or HAWK signals, etc.).
  - (g) Infrastructure repairs (i.e., water main/utility repairs).
  - (h) Modernization and maintenance of pre-existing or previously agreed upon aesthetic designs including miscellaneous landscaping features (plantings, trash receptacles, pedestrian benches, lighting, etc.), etc.
  - (i) Rehabilitation/replacement of a non-historic /non-contributing bridge or culvert
  - (j) Installation, repair, or maintenance of EVSE

### **Bridge and Culvert Improvement Project Types**

3. Non-historic bridge and culvert maintenance, renovation, or total replacement **that requires minor adjacent areas of additional highway right-of-way or easement** and which is **not within the boundaries of a historic property or district**, including:
  - (a) Replacement or maintenance of drainage pipes and culverts made of steel, plastic, and concrete that are less than 10 feet in span, do not have a structure file number, and have no stone or timber segments or features.
  - (b) Replacement or maintenance on non-historic bridges.
  - (c) The installation of vandal fencing, vandal protection lighting and/or cameras, suicide fencing, and/or suicide netting.
4. Historic bridge maintenance activities\* **within existing right-of-way**, including:
  - (a) **General Historic Bridge** Safety, Load, and Maintenance\*
    - 1) Repaving/mill & fill limited to modern concrete or asphalt deck surface.
    - 2) Non-destructive testing or load testing
    - 3) Installation of load and height restriction barriers.
    - 4) Placement of rip rap and channel work.
    - 5) Drainage improvements including but not limited to scupper installation and repair.
    - 6) Replacing or repair of expansion joints, bearings, bearing devices, and sealing deck joints.
    - 7) Debris removal and material-specific cleaning or washing methods.
    - 8) Maintenance or in-kind replacement of noncontributing lighting, poles, fixtures, and conduit.
    - 9) Safety devices and pavement markings as required by RLFD.

- 10) Repair or in-kind replacement of railing. (e.g., parapet, traffic guardrail or standard highway bridge rail).
- 11) Non-destructive graffiti removal.
- 12) Maintenance or replacement of substructure elements matching existing historic materials (e.g., abutment, bent, footings, pile, pier, column and caps).
- 13) Bikeway or walkway easements and nondestructive installations of walkways or platforms (e.g., along the abutment substructure base).
- 14) The installation of vandal fencing, vandal protection lighting and/or cameras, suicide fencing, and/or suicide netting.

**(b) Historic Concrete**

- 1) Patching with compatible materials.
- 2) Concrete sealing.
- 3) In-kind replacement of existing historic I-beam and Box-beam of identical scale and type.
- 4) (See 3a.)

**(c) Historic Metal Truss and Steel Girders**

- 1) Heat straightening or replacement of damaged structural steel and iron components matching existing historic appearance (replacement can only occur if damaged beyond repair).
- 2) Replacing loose fasteners or hardware with in-kind materials. (Rivets should be replaced in accordance with ODOT's [\*Riveting Guidance\*](#)<sup>\*\*</sup>).
- 3) Replacement of matching existing girders, stringers, crossframes, and floorbeams.
- 4) Surface preparation, cleaning, and painting surfaces of structures.
- 5) (See 3a)

**(d) Historic Stone Bridges and Culverts**

- 1) (See 3a.\*)

**(e) Wood and Covered Bridges**

- 1) Installing fire prevention systems, including sealants, nonintrusive lighting, and/or monitoring equipment on covered bridges.
- 2) (See 3a. 1-12)

**(f) Bascule and Movable Bridges**

- 1) Required routine maintenance activities, and replacement of electromechanical systems.
- 2) In-kind repair or replacement of bascule leaf members. (See 3c. 1-4).
- 3) (See 3a.)

\* [\*Ohio Historic Bridge Maintenance & Preservation Guidance\*](#)

\*\* [\*Ohio Department of Transportation Historic Bridge Riveting Guidance\*](#)

## **Bicycle and Pedestrian Project Types**

5. Construction of bicycle lanes and pedestrian walkways, sidewalks, shared-use paths and facilities, small passenger shelters, and alterations to facilities or vehicles in order to make them accessible for older adults and handicapped persons, **that may require additional highway right-of-way or easement**, and which is **not within the boundaries of a historic property or district**.

## **Railroad Project Types**

6. Modernization, maintenance, and safety improvements of railroad facilities, **that may require additional highway right-of-way or easement**, and which is, **not within the boundaries of a historic property or district**, including:
  - (a) Construction of railroad spurs and sidings.
  - (b) Modernization of existing railroad crossing safety equipment
  - (c) Removal of abandoned rail line bridge (no new right-of-way).

## **Other Project Types**

The following undertakings involve facility modernization and property acquisition projects that are **not within the boundaries of a historic property or district**:

7. Modernization of a transportation, transit, or intermodal facility within its existing property boundaries by facility/equipment restoration, rehabilitation, reconstruction, etc.
8. Disposal of excess right-of-way and joint use of limited access right-of-way.

## **Appendix C: Summary of Outcomes from April 12, 2005, Tribal Consultation Meeting**

Summary of Outcomes from April 12, 2005, Tribal Consultation held in Tulsa, Oklahoma with Federally Recognized Tribes in Ohio.

1. Build personal relationship with each Tribe by calling them on the phone. This will help keep the contact lists updated. Tribes prefer corresponding by e-mail.
  - This workshop was viewed as a new beginning to building relationship with Indian Nations.
  - The Tribes at that time did not desire to pursue MOUs. They preferred instead to maintain an informal agreement.
2. FHWA and ODOT will continue to consult with the Tribes on all EA and EIS level Major Projects. FHWA and ODOT will also continue to consult with them on Minor Projects where the roadway is on new location and when archeology sites have been identified and found eligible for the National Register through consultation with the SHPO. (This language reflected Major and Minor Projects as defined by ODOT's PDP in 2005.)
  - Tribes requested that FHWA and ODOT ease up on the paperwork, give them the bottom line.
3. Attending Tribes did not object to working directly with ODOT. As a result:
  - ODOT will send project information directly to the Tribes and will always provide both FHWA and ODOT contact information in all project correspondence.
  - ODOT's handling of administrative, project specific tasks on behalf of FHWA in no way assumes or replaces FHWA's government to government relationship with the federally recognized Tribes.
4. Tribes requested that when finding human remains during construction, the first choice is to leave human remains in place; if they have to be moved, they should be buried as close as possible to where they were found, and document findings, keeping it as confidential as possible. Tribes would always be notified when human remains were discovered on a project, regardless of whether the discovery was made during initial field survey, mitigation activities or an unexpected discovery during construction activities.

## **Appendix D: 2016 Ohio Tribal Transportation Summit Summary and Action Items**

### **Ohio Transportation Tribal Summit Summary**

Throughout the Ohio Transportation Tribal Summit, many topics of concern to both the Tribes and the agencies were discussed. Listed below are key points of discussion and agreement:

- The purchase of land to protect Native American archaeological sites and burial grounds, as mitigation where possible, is supported by the Tribes and ODOT, but must be achieved without the use of eminent domain.
- A majority of the tribal participants expressed their preference for electronic communication over paper correspondence; however, ODOT and FHWA will need to customize consultation methods to fit the needs of individual Tribes.
- ODOT and FHWA must provide the Tribes with sufficient time to review and respond to requests for consultation.
- The Tribes want to be informed about upcoming transportation projects. They want to be consulted at the planning stage in the PDP and then notified throughout the planning process. There was less interest in reviewing projects included in the STIP/ TIP or MTPs at the transportation planning level.
- The idea of developing an electronic database that the Tribes can access was strongly supported. The tribal participants would prefer access to a variety of project related information that can be reviewed by each Tribe to determine if the Tribe needs to respond. A working group on ways to set up electronic reviews was proposed.
- It was agreed that predictive models are tools; they are not a substitute for fieldwork.
- Education about Native Americans emerged as an important topic for the Tribes. The tribal participants expressed support for measures that address their educational concerns, including products generated through the Section 106 process. A communication working group was proposed to explore this need in the context of the transportation planning process.
- The Tribes all felt strongly about the need for ODOT and FHWA to become more familiar with the Tribes, their histories, and their individual needs.
- FHWA and ODOT recognized it will be necessary to tailor consultation protocols to meet the needs of each Tribe.
- The Tribes want to be consulted on projects that involve new ground disturbance; they want to be involved in decisions about National Register eligibility and effects; and, the

Tribes are principally concerned about effects to prehistoric sites and Native American historic sites.

- A 30-day review period is acceptable, although the Tribes want to be able to request additional review time when needed. The review clock must start on the date of receipt not the date correspondence is sent.
- The points of contact will vary with each Tribe and consultation will need to be tailored to meet the consultation needs of each Tribe.
- Each Tribe may have interests in federally funded ODOT projects that are carried out in different parts of the state. These areas can be identified by county. Some Tribes will want to be consulted on projects throughout the state. Other Tribes in only particular areas.
- It was agreed by all participants that ODOT will prepare an outline of the consultation protocol and send this to each Tribe for additional consultation and revision.
- It was agreed that ODOT will consult with the Tribes on behalf of FHWA.

Action Items:

- ODOT committed to preparing a report on the Tribal Summit and getting the report to the Tribes within 30 days. ODOT will include an outline of a consultation protocol that can be refined to meet the needs of each Tribe. He asked that the Tribes review the report and the protocol outline and respond with any comments by mid-January 2017.
- The Tribes committed to sending ODOT their list of Ohio counties to identify their areas of concern by mid-January. Maps will be included.
- The Tribes will send ODOT an updated list of their tribal contacts.
- The Tribes also committed to sending ODOT their tribal histories. A due date was not established for this task.
- ODOT will arrange a conference call with the Tribes for mid-March to begin the discussion on the protocols. The Tribes requested early notification of the conference call dates and reminded ODOT about the time differences between Ohio and the various home states of the Tribes. At the mid-March conference call, the parties can decide on the need to set up an annual conference call or meeting.



ODOT will consult with the Tribes on behalf of FHWA. The Tribes agreed but requested that FHWA contact information be included on all correspondence from ODOT and that they could ask for government-to-government consultation with FHWA at any time.