

MEMORANDUM OF UNDERSTANDING
between the
FEDERAL HIGHWAY ADMINISTRATION,
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION,
and the
EASTERN BAND OF CHEROKEE INDIANS

Whereas, the parties herein provide procedures for consultation and communication, protection of information, and better performance of their duties as stewards of federal land; and,

Whereas, the Federal Highway Administration, South Carolina Division (FHWA-SC) and the South Carolina Department of Transportation (SCDOT) wish to formally establish a Government-to-Government relationship with the Eastern Band of Cherokee Indians (EBCI) for consultation and coordination regarding Section 106 (hereinafter "Section 106") of the National Historic Preservation Act of 1966 as amended (16 U.S.C. §470 et seq.) and implementing regulations (36 CFR Part 800), as well as other Federal acts and Orders including but not limited to the Native American Graves Protection and Repatriation Act (25 U.S.C. §3001 et seq.), the Archaeological Resource Protection Act (16 U.S.C. §470aa et seq.), Presidential Executive Order 13007 (Indian Sacred Sites), Presidential Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Presidential Memorandum on "Government to Government Relations with Native American Tribal Governments" (April 29, 1994), and

Whereas, FHWA-SC is responsible for compliance with Section 106, which provides definitions and procedures for consultation between federal agencies and Native American tribes for federal undertakings, as defined in 36 CFR §800.16(y); and

Whereas, FHWA-SC Planning Regulations (23 CFR §450.210(a)) provide the requirements for each State to provide for a fully coordinated process; and

Whereas, FHWA-SC proposes to administer the Federal-Aid Highway program in South Carolina through the SCDOT as authorized by 23 U.S.C. §101 et seq., 23 U.S.C. §133(d)(2) and 23 U.S.C. §315; and

Whereas, SCDOT employs professional staff who meet the Secretary of Interior's Professional Qualifications Standards (48 FR 44738-9) and are capable of completing the Section 106 process on behalf of FHWA; and

Whereas, FHWA-SC has determined that federal-aid highway transportation projects it funds within the State of South Carolina are federal undertakings carried out by SCDOT; and

Whereas, FHWA-SC and SCDOT recognize that certain undertakings may have an effect upon significant properties included on or eligible for inclusion in the National Register of Historic Places as well as properties that hold a religious and cultural significance to Native Americans; and

Whereas, the EBCI is a Federally recognized Indian tribe that considers some portions of South Carolina to be ancestral lands (Appendix 1), and the potential exists that human remains and cultural properties found in these portions of South Carolina may be affiliated with the EBCI; and

Whereas, the representatives of FHWA-SC and SCDOT have engaged in consultation with representatives of the EBCI on a government to government basis to establish this Memorandum of Understanding; and

Whereas, through the use of the Memorandum of Understanding, the signatories intend to keep the lines of communication open as partners and stewards of the land; and

Whereas, no portion of the Memorandum of Understanding should be interpreted to limit the rights, duties, or responsibilities as may be implemented under federal statutes, regulations, policies, Executive Memoranda or Executive Orders and related documents;

Now, Therefore, FHWA-SC, SCDOT and the EBCI do hereby agree to the following consultation process for federal-aid highway transportation projects in South Carolina:

1. Federal Recognition

EBCI is acknowledged by the Federal Government to have a Government-to-Government relationship with the United States and is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, and thus has status to establish a programmatic consultation process under 36 CFR §800.14(b).

2. Consultation

FHWA-SC grants SCDOT, using staff housed in the Environmental Services Office (ESO) who meet the Secretary of Interior's Professional Qualifications Standards (48 FR 44738-9) authority to fulfill FHWA's informal consultation requirements with the EBCI. FHWA-SC shall approve the outcome of all consultations with the EBCI prior to its award of any assistance for undertakings under the Federal-Aid Highway Program or other program involving FHWA approval.

3. Preferred Communication Method

A. The parties intend to continue consultation as responsible stewards of the land. The parties may periodically schedule face-to-face meetings. However, it may be necessary for the parties to be able to continue consultation in the absence of or in between such scheduled meetings. This section does not alter this intent, but defines interim communications and less formal consultation for those periods where formal consultation is not possible or practicable.

B. The parties agree that the preferred method of communication shall be electronic mail. In the event this means fails, the parties shall use Federal Express (FedEx).

C. Without limiting any right to communicate after this period, the parties intend to reply within thirty (30) days to an issue raised during routine communication. In the absence of a reply, the parties intend to reasonably move forward at the expiration of forty-five (45) days from the first routine communication as though no objections or expressions of concern were received. This in no way limits rights that may be present in law.

4. Points of Contact

For formal Government-to-Government consultation, the FHWA-SC Division Administrator and the EBCI Principal Chief, or their designees, shall be the respective representatives. For interim, ongoing, and non-formal face-to-face meetings in-between more formal consultations, the contacts (set forth in Appendix 2) shall be as indicated below:

1. The points of contact for correspondence to FHWA-SC shall be the Environmental Coordinator. A second point of contact shall be the Planning and Environmental Manager.
2. The point of contact for correspondence to SCDOT shall be the Archaeologists for consultation on projects, determinations of eligibility, findings of effect, excavation plans, or burial-related matters. See Appendix 1 for SCDOT areas of responsibility.
3. The primary point of contact for the EBCI concerning federal undertakings shall be the EBCI Section 106 Specialist with the EBCI THPO copied on all correspondence. The EBCI shall direct all day-to-day correspondence to the SCDOT ESO point of contact. Any official correspondence deemed non-routine shall be directed to the FHWA-SC to ensure federal-to-federal consultation. SCDOT shall provide copies of all correspondence received to the FHWA-SC Environmental Specialist.
4. Each party shall notify the other parties in writing when the point of contact changes. Such changes shall not require amendment of this agreement.

5. Area of Concern

FHWA-SC and SCDOT have consulted with the EBCI to establish the specific area of the state of South Carolina for which the EBCI has concerns for potential cultural or historic properties. That area shall be known as the Area of Concern. The Area of Concern for the EBCI is identified in Appendix 1.

6. Project Planning

A. Statewide Plan Review:

FHWA-SC, and SCDOT, in keeping with a government-to-government relationship, will ensure that the EBCI is provided the opportunity to review and comment on the SCDOT Statewide Transportation Improvement Program (STIP). Upon preparation of a new or revised STIP a list of projects occurring within the Area of Concern will be provided to the EBCI by the SCDOT ESO. Major revisions to the STIP are generally conducted

every three years with minor revisions occurring annually. Once the list is provided, the FHWA-SC and SCDOT ESO will conduct a meeting to discuss the projects and identify potential issues. This meeting may be held via teleconference, video conference, or face-to-face. The review shall provide the EBCI an opportunity to identify and comment on traditional religious and cultural use properties that may be located within a project area during the planning stages of project development.

B. Confidentiality:

The parties agree to maintain the confidentiality of all information pertaining to cultural properties where possible, unless otherwise required by law. The parties shall take all reasonable measures to preclude disclosure of confidential information regarding Native American cultural properties. The FHWA-SC and the SCDOT recognize that the EBCI may be reluctant to divulge specific information regarding location, nature, and activities associated with such properties based on cultural, traditional, and religious beliefs. The EBCI's confidentiality concerns shall be taken into account during the identification process. Response to the STIP is open-ended, and the EBCI may respond as they deem necessary or appropriate. The FHWA South Carolina Division and the SCDOT shall incorporate the comments of the EBCI into the project development process, while efforts to identify cultural resources and properties on undertakings shall proceed by the SCDOT or its designee.

7. Project Specific Consultation:

SCDOT shall consult with the EBCI as early as possible in project planning and development, environmental document development and design of any projects in the Area of Concern.

The EBCI does not waive any rights to review information available by law. However, not all information must be regularly sent to the EBCI, rather the parties agree to the following with regard to the disclosure of information:

1. While retained in FHWA-SC's regular records, and available for review, the EBCI does not require notice of the following information be provided as a matter of course:
 - a. Any proposed federal undertaking in the Area of Concern, which would be "categorically excluded" in accordance with the National Environmental Policy Act (NEPA) and FHWA Regulations 23 CFR §771.117, and would not involve the disturbance of any soil, which has not been previously disturbed, unless the undertaking may affect a known property included or potentially eligible for the National Register of Historic Places that is of religious or cultural significance to the EBCI;
 - b. Any proposed federal undertaking in the Area of Concern in which the area of potential effect has previously been surveyed for historic properties and no eligible or potentially eligible properties, human remains, or cultural items were identified.
2. The following information shall be forwarded to the EBCI by the communication means herein:

- a. Any proposed federal undertaking in the Area of Concern for which the preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) is required;
 - b. Any proposed federal undertaking in the Area of Concern that will disturb any soil which has not been previously disturbed, and has not been surveyed for historic properties;
 - c. Any proposed federal undertaking in the Area of Concern that may affect a known traditional cultural property (TCP) included on or potentially eligible for inclusion on the National Register of Historic Places that is of religious or cultural significance to the EBCI, or may affect human remains or cultural items;
 - d. Any discovery of a historic or prehistoric Native American property in the Area of Concern made as a result of soil disturbing activity. This will provide the EBCI an opportunity to consult on whether the discovered materials are of cultural significance.
3. The following information will be provided by FedEx at all times:
- a. Confirmation of formal face-to-face consultation between the FHWA-SC, the SCDOT and the EBCI Principal Chief.
4. The EBCI shall provide SCDOT with available verbal or documentary information that would assist SCDOT in determining when Native American sites in the Area of Concern may be affiliated with EBCI's current or ancestral occupation of South Carolina.

8. Determination of Eligibility

SCDOT ESO shall provide the EBCI an opportunity to comment on determinations of eligibility for the National Register of Historic Places (under 36 CFR Part 60) for each Native American archaeological site within the EBCI's Area of Concern that has not been determined to be culturally affiliated with another federally recognized tribe, or is unknown in affiliation and will be affected by a proposed transportation activity.

9. Treatment

SCDOT ESO shall provide the EBCI an opportunity to comment on SCDOT's treatment plan for any Native American historic property in the EBCI Area of Concern that has not been determined to be culturally affiliated with another federally recognized tribe or is unknown in affiliation, as follows:

- A. Where feasible, the historic property will be avoided by the proposed transportation activity;
- B. Where avoidance is not feasible or prudent, treatment shall be carried out in accordance with the *Archaeology and Historic Preservation: The Secretary of Interior's Standards and Guidelines*. Treatment shall also:
 - i. be commensurate with the significance of the historic property; and
 - ii. may include educational or public outreach efforts.

In the event that the EBCI objects in writing to the treatment plan within thirty (30) days of receipt of the proposed treatment plan, SCDOT shall review the documentation provided by the EBCI to support its objection and make a reasoned response to the EBCI. If the EBCI continues to object, SCDOT shall provide FHWA-SC a copy of the documentation along with copies of the results of consultation with all consulting parties. FHWA-SC shall review this documentation and:

- A. consult with the EBCI to resolve the objection or with the Advisory Council on Historic Preservation; and
- B. notify all consulting parties of the outcome.

10. Timing

The EBCI shall be provided thirty (30) days from receipt of information in which to review and provide comments to SCDOT for a:

- A. finding that no historic properties are present or likely to be present in the area of potential effect of the project;
- B. determination of eligibility for the National Register of Historic Places;
- C. determination of the project's effect on a significant property; and/or
- D. treatment plan to excavate or mitigate adverse effects of the project on a significant property.

If the EBCI fails to comment within thirty (30) days of receipt of a request for review and comment, a courtesy follow-up phone call or email shall be made. Thereafter, the parties intend to reasonably move forward at the expiration of 45 days from the first routine communication as though no objections or expressions of concern were received. Failure to comment will not prevent EBCI from re-entering consultation at a later point. If the EBCI re-enters the consultation process, SCDOT and FHWA-SC shall continue the consultation without being required to reconsider previous determinations of findings listed above.

11. Inadvertent Discoveries

In the event of an inadvertent discovery of a Native American site during archaeological investigation or construction of the project, SCDOT ESO shall notify the EBCI by telephone or e-mail within 24 hours, if occurring during normal work hours and 48 hours if occurring outside normal work hours, of such a discovery and invite them to visit the site. SCDOT or its designee shall take all reasonable means to protect and safeguard the cultural items or human remains. No work at the site of the finding will move forward until cleared with the EBCI THPO.

If Native American burial(s) are discovered during archaeological investigations or through construction of the project by SCDOT or its designee, all work in the area of the burial(s) will be halted, the burial(s) will be secured to protect them from unauthorized excavation, and the EBCI shall be notified by e-mail or telephone within 24 hours of such a discovery.

1. The preferred treatment of all human remains and associated funerary items shall be preservation in place through implementation of measures feasible in the context of the proposed project to avoid their disturbance. SCDOT shall assess changes in project design and construction methods to determine whether preservation in place is feasible.
2. If in place preservation of human remains and associated funerary items is not possible as assessed by SCDOT, FHWA-SC shall consult with the Federally recognized Native American consulting parties concerning alternatives for the disposition of these items as mandated under 43CFR10 (Sections 10.3 – 10.6) and 36CFR800.13.
3. If it is agreed upon by FHWA-SC, the SC SHPO (State Historic Preservation Office), and the Federally recognized Native American consulting parties that human remains and associated funerary items must be moved, a Memorandum of Agreement (MOA) will be developed to outline how the human remains will be addressed. The MOA will follow the EBCI Treatment Guidelines in Appendix 3.
4. No destructive analysis of human remains and associated funerary items shall be permitted.
5. No human remains shall be put on public display or photographed except for documentation purposes. No photographs of human remains shall be distributed or published without written permission from the participating Federally recognized Native American consulting parties. All photos shall be destroyed once they have served their documentation purposes.
6. In the event that non-Native American human remains are discovered, the SCDOT will comply with all applicable South Carolina State statutes concerning the treatment of non-Native American human remains.
7. Any repatriation or curation efforts will follow the EBCI's Treatment Guidelines for Human Remains and Funerary Objects (Appendix 3).


12. Curation

Any artifacts or cultural materials retained from any project sites shall be curated in a facility meeting the standards of 36 CFR 79, *Curation of Federally Owned and Administered Archaeological Collections*. Artifacts or cultural materials may also be turned over to the EBCI for curation.

13. Terms of This Memorandum of Understanding

This Memorandum of Understanding shall remain in effect indefinitely until terminated by any party (FHWA-SC, EBCI, and the SCDOT) upon a 30-day written notice to other parties. A re-evaluation of the MOU shall occur every five (5) years to determine its validity and effectiveness. Any party to this MOU may request that it be amended, whereupon the parties will consult to consider such amendment. This agreement goes into effect upon the signature and date of the last party.


FEDERAL HIGHWAY ADMINISTRATION
SOUTH CAROLINA DIVISION

BY:  DATE: 10/13/15

Emily O. Lawton
Division Administrator

Recommended by:  DATE: 10/13/2015

THE EASTERN BAND of CHEROKEE INDIANS

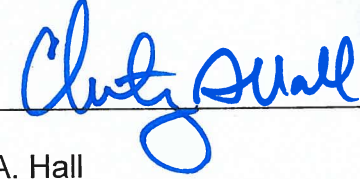
BY:  DATE: 9-10-15

Michell Hicks
Principal Chief of the Eastern Band of Cherokee Indians

BY:  DATE: 9/9/15

Russell Townsend,
Tribal Historic Preservation Officer of the Eastern Band of Cherokee Indians

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION

BY:  DATE: 10/26/15

Christy A. Hall
Acting Secretary of Transportation, SCDOT

Recommended by:  DATE: 10/26/2015