

PART II

CHAPTER 2

**FHWA/INDOT Section 106 Consultation Process
Overview**

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REVISIONS
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Section 2-2.4	added to reflect updated policy
Section 2-2.5	text added to reflect current policy
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Section 2-5.0	added to reflect updated policy
Section 2-6.0	text added to reflect current policy

Contents

2-1.0 Background	4
2-2.0 Roles and Responsibilities.....	4
2-2.1 FHWA-IN-Lead Federal Agency	4
2-2.2 INDOT-CRO	4
2-2.3 Indiana SHPO.....	5
2-2.4 Native American Indian Tribes (Tribes)	5
2-2.5 Applicants and Consultants	6
2-3.0 Qualified Professionals Requirement	7
2-4.0 Section 106 Timelines	8
2-5.0 IN SCOPE.....	10
2-6.0 Consultation Best Practices.....	10
2-6.1 Section 106 Consulting Party Meetings	10
2-6.2 Consulting Party Review and Public Comments.....	12

2-1.0 Background

This chapter provides an overview of the Federal Highway Administration (FHWA) and INDOT's Section 106 consultation process. Specifically, this chapter explains the roles of FHWA, INDOT, the Indiana State Historic Preservation Officer (IN SHPO), project applicants/sponsors and consultants. Moreover, this chapter summarizes the key aspects of the FHWA/INDOT Section 106 process. Subsequent chapters provide detailed procedures on how to complete the Section 106 process.

2-2.0 Roles and Responsibilities

2-2.1 FHWA-IN-Lead Federal Agency

Per the [*Programmatic Agreement \(PA\) Among the Federal Highway Administration, the Indiana Department of Transportation, the Advisory Council on Historic Preservation and the Indiana State Historic Preservation Officer Regarding the Implementation of the Federal Aid Highway Program in the State of Indiana*](#) (also known as the "Minor Projects PA"), INDOT independently performs much of the work and consultation described in 36 CFR Part 800. While INDOT has been delegated much of the oversight of the Section 106 process, per 36 CFR 800.2(c)(4), FHWA will remain legally responsible for all findings and determinations required by federal law. The level of involvement by FHWA will reflect the complexity of the historic preservation issues involved in a project, and will be determined on a case-by-case basis, taking into account any views expressed by the applicant, the SHPO, the ACHP, and/or consulting parties.

INDOT's Cultural Resources Office (CRO) reviews all Section 106 documents on behalf of FHWA. Findings for undertakings with determinations of "no adverse effect" or "no historic properties affected" are approved by INDOT, acting on FHWA's behalf. After INDOT's review, FHWA approves findings for all undertakings with "adverse effect" determinations.

In recognition of the unique government-to-government relationship between the Federal government and Indian Tribes, FHWA shall take the lead in identifying and establishing consultation with the Indian Tribes and Tribal Historic Preservation Officers (THPO) consistent with 36 CFR 800.2(c)(2). If the tribe is agreeable, further consultation may be conducted between the tribe and INDOT. Likewise, FHWA is responsible for conducting consultation with the ACHP.

2-2.2 INDOT-CRO

INDOT--specifically CRO--has been delegated by FHWA to oversee much of its Section 106 program. On behalf of FHWA, INDOT may independently perform, approve, and oversee Section 106 consultation as described in the following sections of 36 CFR Part 800:

- In accordance with 36 CFR § 800.3:
 - (1) Establish the undertaking;

- (2) Coordinate with other reviews;
 - (3) Identify the appropriate SHPO and/or THPO;
 - (4) Plan to involve the public;
 - (5) Identify other consulting parties; and
 - (6) Expedite consultation.
- In accordance with 36 CFR § 800.4:
 - (1) Determine the scope of identification;
 - (2) Identify historic properties;
 - (3) Evaluate historic significance; and
 - (4) Provide results of identification and evaluation to SHPO and consulting parties.
 - In accordance with 36 CFR § 800.5:
 - (1) Apply criteria of “adverse effect”;
 - (2) Issue finding of “no adverse effect”;
 - (3) Notify SHPO and consulting parties of the finding; and
 - (4) Provide SHPO and consulting parties with the documentation specified in 36 CFR § 800.11(e).

2-2.3 Indiana SHPO

In Indiana, the Director of the Department of Natural Resources (DNR) is designated as the State Historic Preservation Officer (SHPO). In 1981, the General Assembly established the [Division of Historic Preservation and Archaeology](#) (DHPA) within the DNR, whose mission is to carry out the federal-state partnership of the NHPA. The Director of the DHPA was named Deputy SHPO and is charged with the daily oversight of the state’s preservation programs and policies.

The SHPO is the primary consulting party throughout the Section 106 process. The SHPO will review all Section 106 documentation, excepting those projects covered under the Minor Projects PA. Consultation with the SHPO is critical to successfully completing Section 106.

2-2.4 Native American Indian Tribes (Tribes)

Indiana is the ancestral homeland of federally recognized Tribes. Section 101(d)(6)(B) of the NHPA requires the agency official to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking. As such, in March 2017, the “MEMORANDUM OF UNDERSTANDING AMONG THE FEDERAL HIGHWAY ADMINISTRATION, INDIANA STATE HISTORIC PRESERVATION OFFICER,

INDIANA DEPARTMENT OF TRANSPORTATION, and FEDERALLY RECOGNIZED TRIBES INTERESTED IN INDIANA LANDS REGARDING TRIBAL CONSULTATION REQUIREMENTS FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM,” commonly referred to as the “Tribal MOU” for short, was executed. The Tribal MOU establishes formal consultation practices between FHWA, INDOT and federally recognized Tribes.

Specific tribal consultation procedures following the Tribal MOU are incorporated throughout the CRM. A copy of the [Tribal MOU](#) is available on the CRO website.

2-2.5 Applicants and Consultants

For purposes of these procedures, the “applicant” is defined as the owner of the roadway/bridge (INDOT or Local Public Agency [LPA]). In other words, the applicant is the project sponsor. FHWA authorizes applicants (or their consultants) for all FHWA-IN projects to initiate Section 106 consultation on behalf of FHWA in accordance with these procedures to the fullest extent allowed under 36 CFR 800.2(c)(4), unless otherwise directed by the FHWA.

Applicants, their designees, and their consultants, may prepare information, analyses, and recommendations as part of the Section 106 process, in accordance with 36 CFR 800.2(a)(3). In order to complete Section 106 documentation on behalf of FHWA and INDOT, consultants first must be listed as an [INDOT prequalified consultant](#) under *Category 5.9 Archaeological Investigations* and *Category 5.10 Historical/Architectural Investigations*. Please keep in mind that per 7-2.01 of INDOT’s [LPA Guidance Document](#), all professional services leading to federally funded construction must be performed by INDOT prequalified consultants or by LPA in-house staff that have been approved by INDOT as having the same technical qualifications specified for consultants. This is regardless of whether federal funds for the services are being reimbursed or credits are being accrued.

In order to be listed as an INDOT prequalified consultant in Category 5.9 and Category 5.10, individuals at a minimum must meet the [Secretary of Interior's Professional Qualification Standards](#) and be listed on the [DHPA’s Qualified Professionals Roster](#). Additionally, as explained in further detail in Chapter 2-3.0, Section 106 documentation must be prepared by individuals meeting the [Secretary of Interior's Professional Qualification Standards](#) and listed on the [DHPA’s Qualified Professionals Roster](#).

Applicants, their designees, and their consultants, who meet the qualification standards above are permitted to assist FHWA and INDOT in completing the activities required under 36 CFR 800.4, "Identification of Historic Properties"; 36 CFR 800.5, "Assessment of Adverse Effects"; 36 CFR 800.6, "Resolution of Adverse Effects," and recommendations for the area of potential effects, eligibility determinations, and effect findings for FHWA/INDOT approval.

Consultant Performance

Please note that INDOT staff evaluates consultant performance with the submittal of each deliverable and at other times as appropriate. Refer to the [INDOT Consultant Performance Evaluation Guidelines](#) for more information.

Moreover, applicants, their designees, and consultants may carry out on behalf of FHWA non-decision making functions assigned to the "agency official" in the Section 106 regulations, including day-to-day coordination with consulting parties, the SHPO, and other participants in the Section 106 process. Such coordination could include invitation of consulting parties, distribution of FHWA/INDOT approved eligibility determinations and effect findings, invitations to consulting party meetings, distribution of minutes, and responses to SHPO requests for additional information. If a controversial issue arises, coordination should occur with INDOT-CRO. INDOT will consult with FHWA as appropriate to resolve the issue.

The applicant or their consultant should “cc” INDOT on all Section 106 correspondence sent to the SHPO or any consulting party. The Section 106 correspondence may indicate that responses and comments be directed to the consultant, who is working on behalf of the applicant. However, in any correspondence to the SHPO or consulting parties, the applicant or their consultant should specifically request that recipients “cc” INDOT on their responses to that correspondence. The applicant or their consultant should “cc” FHWA only when it is anticipated that the project will involve an “adverse effect,” or as directed by INDOT-CRO.

Refer to the Forms section of the CRM for correspondence templates. These templates should be followed when preparing correspondence to consulting parties.

Remember:

All Section 106 documentation should be directed towards INDOT-CRO for review and approval prior to distribution to SHPO and consulting parties.

As FHWA and INDOT rely on consultants to assist in Section 106 activities, we expect consistent quality. To that end, consultants are expected to have a thorough understanding of FHWA and INDOT Section 106 procedures. When deficient work is identified, the consultant will be expected to show improvement. If a pattern of deficient work persists, INDOT may seek more formal action, including suspension or removal of the consultant from INDOT’s prequalified consultant list.

2-3.0 Qualified Professionals Requirement

The National Historic Preservation Act (Section 112) and Section 106 regulations [800.2(a)(1)] require agencies responsible for protecting historic properties to ensure that all actions taken by their employees or contractors meet the [Secretary of Interior's Professional Qualification Standards](#). Therefore, FHWA and INDOT only accept Section 106 documentation that has been prepared by Qualified Professionals (QP) meeting the Secretary of Interior's Professional Qualification Standards. Further, individuals meeting the Qualified Professional Standards must also be listed on the [DHPA's Qualified Professionals Roster](#). Individuals who meet the Professional Qualification Standards and wish to be included in the Qualified Professionals Roster are invited to submit the appropriate forms together with supporting materials to the DHPA. The DHPA will review documentation to determine if the qualifications meet the Federal and State Standards. Please note that inclusion on the list does not constitute DHPA’s endorsement of any individual consultant, any contracting firm, or any consultant’s work or work products.

Examples of Section 106 documentation that Qualified Professionals must prepare include:

- Formulating areas of potential effects;
- Identification and evaluation of cultural properties including historic property reports and archaeological survey/investigation reports;
- Assessment of effects;
- 800.11 documentation*
- National Register of Historic Places (National Register) application preparation;
- Completion of certain MOA stipulations such as county historic inventories, HABS/HAER-level documentation, state-level photographic and written documentation, and archaeological data recovery (Phase III).

*FHWA and INDOT recognize that non-QPs sometimes participate in the preparation of 800.11 documentation. However, a QP is responsible for the final prepared documentation that is provided to INDOT for review and subsequently to consulting parties. When 800.11 documentation is submitted to INDOT-CRO for review by a non-QP (usually a prime consulting firm’s environmental/planning staff), the QP responsible for the 800.11 documentation shall provide written endorsement verifying their role in its preparation. When the 800.11 documentation is distributed to consulting parties by a non-QP, the cover/transmittal letter shall specify the QP responsible for the document’s preparation. The QP will receive the consultant performance evaluation regardless of the extent of their role in the preparation of the 800.11 documentation.

Other Section 106 coordination and preparation efforts may be conducted by other professional staff working in consultation with a Qualified Professional. Examples of these efforts/documents include:

- Identifying and inviting consulting parties to participate;
- Preparing and sending out early coordination documents;*
- Preparing MOA documents.

*When a non-QP submits documents on behalf of a QP or has prepared documents in consultation with a QP, such as an early coordination letter, the cover/transmittal letter should indicate the consulting QP and cc them on the correspondence.

Remember:

In addition to being listed on DHPA’s Qualified Professionals Roster, consultants must be prequalified to work for INDOT under categories 5.9 Archaeological Investigations and 5.10 Historical/Architectural Investigations.

2-4.0 Section 106 Timelines

The Section 106 process can be lengthy, and there are many different aspects of the process that affect the timeline. Examples include:

- The scope of the project: Larger projects require more time for identifying and documenting cultural resources;

- Weather: Archaeological survey cannot proceed while the ground is frozen, snow is on the ground, or in heavy rain;
- The number of historic properties identified: This will necessarily affect the timeline;
- The nature of the historic properties: A small lithic scatter might be documented in a day, while a buried prehistoric village site could take many months; While it may take a few days to evaluate a single historic home, it may take many weeks to evaluate a historic district composed of many structures;
- The finding of effect: A finding of “adverse effect” will take more time to resolve than a finding of “no adverse effect”;
- Consultation with the ACHP or the Keeper of the Register: A project that involves a property being forwarded to the Keeper can involve significant delays. Likewise, if the ACHP is brought into a project due to controversy, this may delay the project;
- Review time: During various stages of the Section 106 process the SHPO and consulting parties are given 30 days to comment. If submissions are inadequate or confusing the agency may stop the 30-day “clock” and request more information.

The following table illustrates Section 106 timelines, separated by findings of effect. These time frames are estimates based on average agency review times, and they assume accurate and complete information/documentation was submitted to the agencies. The consultation for findings of “no adverse effect” and “adverse effect” are difficult to predict, so these timeframes account for variables such as follow-up correspondence, consulting party meeting coordination, and extensive MOA coordination (for findings of “adverse effect”). Please refer to the appendix for the Section 106 process flow chart.

Table 2-1: Section 106 Timelines

Project Effect Finding	Average Completion Time
Minor Projects PA Category B (no fieldwork)	2 Weeks
Minor Projects PA Category B (fieldwork)	2 Months
Finding of “no historic properties affected”-Regular Section 106 process	4-6 Months
Finding of “no adverse effect”- Regular Section 106 process	4-8 Months
Finding of “adverse effect”- Regular Section 106 process	8-12 Months
Historic Bridge Project	6-12 Months

2-5.0 IN SCOPE

IN SCOPE is INDOT's Section 106 electronic coordination website- <http://erms.indot.in.gov/Section106Documents/> . All Section 106 documents are posted on IN SCOPE for consulting party review. After Section 106 documents are approved by INDOT-CRO, the document is checked-in to IN SCOPE by the consultant. Once the checked-in document is approved by the CRO reviewer, the document will be released. After the document is released the consultant can inform consulting parties that the document is available for review. While all Section 106 documents are available on IN SCOPE for review, archaeology reports are only available to Native American Tribes. All other documents are viewable.

Please see xxx for instructions for registering as a consultant to IN SCOPE. Other guidance documents are available on the IN SCOPE website.

2-6.0 Consultation Best Practices

As Table 2.1 shows, the Section 106 process can potentially take over a year to complete. Section 106 is a consultative law, thus much of its completion is dictated on how well the process is followed and consulting parties are engaged. Consequently, FHWA and INDOT have formulated a number of "best practices" designed to streamline the Section 106 process. These are presented below. Subsequent chapters provide more specific procedures for Section 106 compliance.

For minor, non-controversial projects, consultation may address multiple steps (from initiation of the Section 106 process to defining the APE, identification of historic properties, assessment of effects, and resolution of an "adverse effect") in one 30-day comment period when FHWA, INDOT and SHPO agree it is appropriate, as long as the consulting parties and the public have an adequate opportunity to express their views.

Remember:

Before commencing with Section 106 consultation, two critical steps should be followed. First, determine that the project is an undertaking. Second, reference the Minor Projects PA to determine whether a) the project fits within a Minor Projects Category or b) it may be a candidate for expedited consultation.

2-6.1 Section 106 Consulting Party Meetings

Where deemed appropriate by FHWA or INDOT during the Section 106 process, the applicant or their consultant will organize a consulting party meeting and invite consulting parties. When there is a possibility of a finding of "adverse effect," a consulting party is recommended

to address consulting party concerns and seek measures to minimize, avoid and mitigate potential adverse effects. The applicant or consultant shall consult with FHWA and INDOT regarding the need for a consulting party meeting.

When it has been determined that there will be a consulting party meeting, potential meeting dates should be coordinated with INDOT-CRO, FHWA, and SHPO. The agencies should agree

on a meeting date before invitations are sent out to other consulting parties. If Tribes are participating and have a specific interest in the project or there are properties of concern to the Tribes, then they should be coordinated with alongside the agencies before determining a meeting date. FHWA and INDOT will be responsible for coordinating with the Tribes. It is often appropriate to meet near the project location to better accommodate local consulting parties and to visit the project area. If requested, options for call in or web based attendance of the meeting should be made available for consulting parties. In most cases, meeting coordination between the agencies and formal notification to consulting parties can occur via email as long as email addresses have been identified.

For simple projects that are not controversial and do not result in an “adverse effect” finding, the entire consultation process may be done through document reviews and correspondence. Depending upon the complexity of the project, several consulting party meetings or other informal meetings with various participants in the Section 106 process may be required.

For major or very complex projects, separate consulting party meetings may be held for each step of the consultation process – defining the area of potential effects, the identification and evaluation of potentially eligible properties, the assessment of effects and the development of mitigation. Consult with INDOT/FHWA for further guidance.

If a consulting party meeting is held, the following procedures apply:

- a. An agenda and appropriate documentation will be forwarded to consulting parties approximately two weeks in advance of the meeting, unless otherwise approved by FHWA and INDOT;
- b. The applicant or their consultant will distribute a summary of the meeting to all consulting parties approximately one week after the meeting to document the consultation and the decisions made. The meeting summary should be included in the appendix of the 800.11 documentation once prepared.

Section 106 consulting party meetings will allow FHWA and INDOT to consult with the applicant, the SHPO, and consulting parties regarding issues that may arise in the Section 106 process. This consultation will facilitate consideration of all reasonable alternatives, encourage minimization where appropriate, and result in timely decisions.

2-6.2 Consulting Party Review and Public Comments

Consulting parties are generally afforded 30 days to comment on Section 106 documentation and findings. Sufficient information (except for archaeological site locations) must be shared to allow for meaningful comments during the various stages and decision-making points of the process. The Section 106 regulations state that the federal agency must ensure that adequate time is given so the public will have the opportunity to both obtain information and to provide viewpoints.

Although public notice should be conducted using existing FHWA procedures, the public can express their views at any time, without waiting for a formal request. At any juncture in the Section 106 process a potential consulting party can request to become--and will be accepted as--a consulting party.

The intent of consultation with consulting parties is to allow for early and timely input. Failure to raise issues that could have been addressed during such opportunities may result in these comments not receiving the same consideration that they would have received if raised at the appropriate time. Comments on old issues will be considered if those comments are based on new information. However, back-tracking to previously resolved issues will occur only if the new information is at substantial variance with what was expected, and if the new information pertains to an issue of sufficient magnitude and severity to warrant reconsideration.

Remember:

Archaeological reports are provided only to the SHPO and Tribes. A hard copy is sent to the SHPO, and Tribes are able to view the report via secured access to IN SCOPE. Summaries of the findings of the archaeological reports are sent to all other consulting parties. Per Section 304 of the National Historic Preservation Act and Section 9(a) of the Archaeological Resources Protection Act, specific archaeological site locations should not be included in documentation made available to consulting parties and the general public.

Tips for Successful Section 106 Consultation

- Coordinate early with INDOT-CRO with any questions;
- Identify and invite consulting parties early in the Section 106 process;
- Keep consulting parties abreast of any changes in the project. Consult as decisions are being made, not after they are made;
- If particular groups or individuals ask to be consulting parties, let them;
- If possible, travel to meet with consulting parties at their places of business or their location, rather than asking consulting parties to travel to you;
- Invite consulting parties to physically tour the project area. Actually seeing a project area and historic properties in person will be valuable when consulting parties are forming opinions about your project;
- Allow consulting parties the time and venue to voice their concerns, listen respectfully, and consider their opinions;
- Send the FHWA Section 106 documentation only after a finding of “adverse effect” is anticipated.

