PART II
CHAPTER 8
Assessments of Effect

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REVISIONS

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Section 2.0 and 3.0 updated policy to reflect the requirement of the Tribal MOU and the use of IN SCOPE
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8-1.0 Overview

After the identification of historic properties within the APE is complete for both above-ground and archaeological resources, assessment of effects will commence. There are three possible effect findings:

1. “No historic properties affected” - This finding is appropriate when it is determined that no historic properties are present in the APE or there are historic properties present, but the undertaking will not have any effect on them;

2. “No adverse effect” – This finding is appropriate when the undertaking may impact a historic property, but that impact will not alter the characteristics (directly or indirectly) that qualify a property for listing on the NRHP;

3. “Adverse effect” – A finding of “adverse effect” is appropriate when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling or association.

Making an effect finding and preparing supporting documentation as specified in 36 CFR Section 800.11(d) and (e) as applicable is required to successfully conclude the Section 106 process. The following chapters describe in detail the three effect finding types, documentation and consultation requirements.

8-2.0 Finding of "No Historic Properties Affected"

Once efforts to identify historic properties are complete and assessment of effects is concluded, if the applicant or their consultant believes that no historic properties are present or that historic properties are present but the project will have no effect on those historic properties [as defined at 36 CFR § 800.16(i)], they should proceed as follows:

1. Forward the recommendations and support documentation to INDOT-CRO for approval. Two templates have been prepared that may be used, by applicants or their consultants, to submit finding recommendations and the required support documentation. The finding template (“Sample Format for a Section 106 Recommendation for Area of Potential Effect, Eligibility Determinations, and Effect Findings and Section 4(f) Compliance Requirements”) is included in Part 5- Forms. The template for documentation supporting a “No Historic Properties Affected” finding, as specified in 36 CFR § 800.11(d), is included in Part 5- Forms (“Sample Format and Guidance for Documenting FHWA’s NO HISTORIC PROPERTIES AFFECTED finding”);
2. If INDOT agrees that no historic properties will be affected by the undertaking, INDOT will sign the finding. If INDOT disagrees with the recommendation, requires further information before reaching a decision, or requires revisions to the documents, it will send an e-mail to the applicant or their consultant setting forth its position. Once approved and signed, INDOT will send the signature page to the applicant or consultant, who will in turn send a hard copy of the “finding” and 800.11(d) documentation to the SHPO for concurrence. Simultaneously, the consultant will post the finding and 800.11(d) to IN SCOPE. Once released by the CRO reviewer, the consultant will email the consulting parties notifying them that the documents are available on IN SCOPE for their review and comment. INDOT-CRO will forward the email to Tribes. The transmittal letter will be attached to the email. If an email address is not identified for a consulting party or if they request a hard-copy, the consultant should proceed to send a hard-copy. The email and transmittal letter should indicate that recipients has seven days to request a hard copy. Additionally, the transmittal letter should note that “if no one takes exception to the ‘no historic properties affected’ recommendation within 30 days, the Section 106 process for this project will be concluded.”;

3. Section 106 is concluded once the SHPO has agreed--in writing--with the finding or if, within 30 days of receipt, neither SHPO nor another consulting party has objected to the finding. If the SHPO or any consulting party objects--in writing--to INDOT's finding within 30 days of receipt of an adequately documented finding, the documentation will be submitted to FHWA for resolution;

4. A public notice should be issued providing the public 30 days to submit comments on INDOT's finding. The public notice can be issued simultaneously with the distribution of the 800.11 documentation, once INDOT has signed the finding. A template providing guidance on the language to be placed in the public notice is provided in Part 5-Forms. If there is no disagreement with the “no historic properties affected” finding after the 30-day consultation and public comment period, the Section 106 process is concluded.

8-3.0 Assessment of Adverse Effects

When historic properties are identified within the APE and they will be affected, it is necessary to apply the criteria of “adverse effect” to determine the appropriate finding of effect, taking into account consulting party input. “Adverse effects” may include “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.”¹ “Adverse effects” on historic properties include but are not limited to:

- Physical destruction of or damage to all or part of the property;
- Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous materials remediation, and provision of handicapped access, that

¹ 36 CFR Section 800.5(a)(1).
is not consistent with the Secretary’s standards for the treatment of historic properties and applicable guidelines;²

- Removal of the property from its historic location;
- Change of the character of the property’s use or of physical features within the property’s setting that contribute to its historic significance;
- Introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features;
- Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and
- Transfer, lease or sale of property out of federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance.³

Questions to take into account during the effects assessment include: Will right-of-way be acquired from the historic property? Will any part of the property be demolished? Will any landscape features be removed, etc? Will there be introduction of visual elements that will diminish the property’s setting and feeling?

When assessing “adverse effects,” it is important to understand why the property is significant and what aspects of integrity are most critical to convey that significance. For instance, removal of mature trees adjacent to a historic residence may be seen as an “adverse effect” due to diminishment of the property’s setting and feeling. Conversely, removal of mature trees adjacent to a historic industrial property is less likely to have an “adverse effect.”

Assessment of “adverse effects” is arrived at through consultation between the project’s Qualified Professional, INDOT-CRO, FHWA (if applicable), SHPO, Tribes, and other consulting parties. For most projects, it is at this phase that a consulting parties meeting should be held. One of the most effective ways to support the eventual effect finding is to point towards the input received from consulting parties.

Only one “adverse effect” determination for one historic property is enough for the whole project to have an “adverse effect” finding. However, a finding of “adverse effect” does not mean that the project is a “bad project” or that a project cannot proceed; it simply means that alternatives to affecting the historic resource and ways to minimize affecting the historic resource must be considered. Ultimately, the decision to proceed rests with the federal agency.

FHWA and INDOT encourage phased application of the criteria of “adverse effect” for projects involving alternatives that consist of corridors or larger land areas, pursuant to 36 CFR §

² 36 CFR Part 68.
³ 36 CFR Section 800.5(a)(2).
800.5(a)(3). When an applicant believes such an approach is appropriate, the applicant should consult with FHWA and INDOT.

**8-3.1 Finding of “No Adverse Effect”**

Upon completion of assessment of “adverse effects,” if the applicant or their consultant believes that the undertaking will have “no adverse effect” on historic properties, they should proceed as follows:

1. Forward the recommendations and support documentation to INDOT-CRO for approval. Two templates have been prepared that may be used, by applicants or their consultants, to submit finding recommendations and the required support documentation. The **finding template** (“Sample Format for a Section 106 Recommendation for Area of Potential Effect, Eligibility Determinations, and Effect Findings and Section 4(f) Compliance Requirements”) is included in Part 5- Forms. The template for **documentation** supporting a “no adverse effect” or “Adverse Effect” finding, as per 36 CFR Section 800.11(e), is included in Part 5-Forms (“Sample Format and Guidance for Documenting FHWA’s NO ADVERSE or ADVERSE EFFECT finding”);

2. When preparing the effect determination, specifically reference the examples of “adverse effect” per 36 CFR Section 800.5(a)(1). Keep in mind that the examples of “adverse effect” are not inclusive of all types of “adverse effects.” Nevertheless, referencing the examples indicates that the regulations and its description of “adverse effects” were considered.

3. If INDOT agrees that no historic properties will be adversely affected by the undertaking, INDOT will sign the finding. If INDOT disagrees with the recommendation, requires further information before reaching a decision, or requires revisions to the documents, it will send an e-mail to the applicant or their consultant setting forth its position. Once approved and signed, INDOT will send the signature page to the applicant or consultant, who will in turn send a hard copy of the “finding” and 800.11(e) documentation to the SHPO for concurrence. Simultaneously, the consultant will post the finding and 800.11(e) to IN SCOPE. Once released by the CRO reviewer, the consultant will email the consulting parties notifying them that the documents are available on IN SCOPE for their review and comment. INDOT-CRO will forward the email to Tribes. The transmittal letter will be attached to the email. If an email address is not identified for a consulting party or if they request a hard-copy, the consultant should proceed to send a hard-copy. The email and transmittal letter should indicate that recipients has seven days to request a hard copy. Additionally, the transmittal letter should note that “if no one takes exception to the ‘no adverse effect’
recommendation within 30 days, the Section 106 process for this project will be concluded.”

4. Section 106 is complete when SHPO has agreed—in writing—with the finding or if, within 30 days of receipt, neither SHPO nor another consulting party has objected to the finding. If the SHPO or a consulting party objects in writing to INDOT’s finding of “no adverse effect,” then INDOT shall consult with FHWA and the objecting party to resolve this objection. If after such consultation FHWA determines that the objection cannot be resolved through consultation, then FHWA shall forward all documentation relevant to the objection to the ACHP, including FHWA’s proposed response to the objection. Within 15 days after receipt of all pertinent documentation, the ACHP shall exercise one of the following options:

   a) Advise FHWA that the ACHP concurs in FHWA’s proposed response to the objection, whereupon FHWA will respond to the objection accordingly; or

   b) Provide FHWA with recommendations, which FHWA shall take into account in reaching a final decision regarding its response to the objection;

   c) Should the ACHP not exercise one of the above options within 15 days after receipt of all pertinent documentation, FHWA may assume ACHP’s concurrence with the proposed response to the objection.

After the 15-day time period expires, or after FHWA receives and considers the ACHP’s advisory opinion on the effect finding, the FHWA will issue a letter to all consulting parties documenting the final finding.

5. A public notice should be issued providing the public 30 days to submit comments on INDOT’s finding. The public notice can be issued simultaneously with the distribution of the 800.11 documentation, once INDOT has signed the finding. A template providing guidance on the language to be placed in the public notice is provided in Part V Forms. If there is no disagreement with the “no adverse effect” finding after the 30-day consultation and public comment period, the Section 106 process is concluded.

8-3.2 Finding of “Adverse Effect”

Upon completion of assessment of “adverse effects,” if the applicant or their consultant believes that the undertaking will have an “adverse effect” on historic properties, they should proceed as follows:

1. Forward the recommendations and support documentation to INDOT-CRO for approval. Two templates have been prepared that may be used, by applicants or their consultants, to submit finding recommendations and the required support documentation. The finding template (“Sample Format for a Section 106 Recommendation for Area of Potential Effect, Eligibility Determinations, and Effect Findings and Section 4(f) Compliance Requirements”) is included in Part V Forms. The template for documentation supporting an “adverse effect” finding, as per 36 CFR Section 800.11(e), is included in Part V Forms.
2. When preparing the effect determination, specifically reference the examples of “adverse effect” per 36 CFR Section 800.5(a)(1). Keep in mind that the examples of “adverse effect” are not inclusive of all types of “adverse effects.” Nevertheless, referencing the examples indicates that the regulations and its description of “adverse effects” were considered.

3. If INDOT agrees with recommendations of “adverse effect,” it will forward the recommendations to FHWA for signature. After FHWA signature, the document will be returned to the applicant or their consultant for distribution to the SHPO and posting to IN SCOPE for other consulting party review. If INDOT disagrees with the recommendation, requires further information before reaching a decision, or requires revisions to the documents, it will send an e-mail to the applicant or their consultant setting forth its position;

4. FHWA will notify the ACHP of the likely “adverse effect,” with documentation provided by the consultant, and inviting them to be a consulting party. If there is no known controversy, FHWA will notify the ACHP concurrently with the finding review period. When there is controversy, FHWA will notify the ACHP at the conclusion of the finding review period to provide the ACHP with the latest consultation summary. In any case, the ACHP will notify FHWA within 15 days of receipt of the notice whether it will participate.

5. The applicant or their consultant should send a hard copy of the “finding” and documentation (800.11(e)) to the SHPO for concurrence. The consultant will also post the finding and 800.11(e) to IN SCOPE. Once released by the CRO reviewer, the consultant will email the consulting parties notifying them that the documents are available for their review and comment. INDOT-CRO will forward the email to Tribes. The transmittal letter will be attached to the email. If an email address is not identified for a consulting party or if they request a hard-copy, the consultant should proceed to send a hard-copy. The email and transmittal letter should indicate that recipients has seven days to request a hard copy. Where deemed appropriate by INDOT or FHWA, the transmittal letter forwarding the Section 800.11(e) documentation should schedule a Section 106 consulting parties meeting to discuss that documentation. This will enable INDOT and FHWA to ensure that all reasonable minimization options have been evaluated and will allow INDOT and FHWA to work with the consulting parties to resolve outstanding issues.

Notifying the ACHP

When notifying the ACHP of an adverse effect, the following form and instructions should be completed:

http://www.achp.gov/docs/e106-instructions-form.pdf

Once the form is completed, this will be provided to INDOT who will forward to FHWA. All ACHP notifications must come directly from FHWA.

("Sample Format and Guidance for Documenting FHWA’s NO ADVERSE or ADVERSE EFFECT finding.");
6. The project may proceed if the SHPO has agreed--in writing--with the finding or if, within 30 days of receipt, neither SHPO nor another consulting party has objected to the finding. If the SHPO or any consulting party objects--in writing--to INDOT's finding within 30 days of receipt of an adequately documented finding, the documentation will be submitted to FHWA for resolution.

7. A public notice should be issued providing the public 30 days to submit comments on INDOT’s finding. The public notice can be issued simultaneously with the distribution of the 800.11 documentation, once FHWA has signed the finding. A template providing guidance on the language to be placed in the public notice is provided in Part V Forms. If no one disagrees with the finding after the 30-day consultation and public comment period, the resolution of “adverse effect” stage of the Section 106 process may begin.

8. If a disagreement arises between the applicant, INDOT, FHWA, and/or the SHPO regarding resolution of “adverse effect,” an additional Section 106 consulting party meeting involving the ACHP may be necessary.

Please see Part II Chapter 9 for specific guidance on resolution of “adverse effects.”