

# STATE OF IOWA

## PROGRAMMATIC AGREEMENT

*Among the*

IOWA DEPARTMENT OF TRANSPORTATION,  
IOWA DIVISION, FEDERAL HIGHWAY ADMINISTRATION,

*and the*

IOWA STATE HISTORIC PRESERVATION OFFICER

JULY 2002

Based Upon

*36 CFR, PART 800, Sections 800.1 through 800.16*  
*“Protection of Historic Properties”*  
Final Rule: January 2001

Iowa Department of Transportation  
Highway Division  
Office of Location and Environment  
Ames, Iowa

# PROGRAMMATIC AGREEMENT

*AMONG THE*  
**IOWA DIVISION, FEDERAL HIGHWAY ADMINISTRATION,  
IOWA STATE HISTORIC PRESERVATION OFFICER,  
AND THE**  
**IOWA DEPARTMENT OF TRANSPORTATION**

**WHEREAS:** the Iowa Division Administrator, Federal Highway Administration (**FHWA**), is the “Agency Official” responsible for compliance with Section 106 of the *National Historic Preservation Act of 1966* (**NHPA**), as amended (*16. U.S.C. 470 et seq.*) and implementing regulations (*36 CFR, Part 800*) for the Federal Aid Highway Program in Iowa; and

**WHEREAS:** the Iowa Department of Transportation (**DOT**), in consultation and partnership with the FHWA, administers federal-aid highway projects (undertakings) throughout the State of Iowa as authorized by Title 23, U.S.C.; and

**WHEREAS:** the Iowa State Historic Preservation Officer’s (**SHPO**) responsibilities, under Section 106 of the NHPA and 36 CFR, Part 800, are to advise, assist, 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:** the FHWA, SHPO, and DOT signed a Partnering Charter on May 6, 1977, that established a Cultural Interchange Team (CIT) that meets regularly to discuss policies, procedures and project related issues [see Attachment 1]; and

**WHEREAS:** the FHWA; **1)** has determined that certain transportation projects constitute “undertakings” which may have an effect upon properties included in, or eligible for inclusion in, the *National Register of Historic Places* (**NRHP**); **2)** has consulted with the SHPO, the Advisory Council on Historic Preservation (**Council**), and other consulting parties pursuant to 36 CFR, Part 800; **3)** wishes to ensure that the DOT will conduct its programs in a manner consistent with 36 CFR, Part 800; and **4)** intends to integrate its historic properties preservation planning and management decisions with other policy and program requirements (such as those of the *National Environmental Policy Act* [**NEPA**]) to the maximum extent possible, consistent with Section 110 NHPA; and

**WHEREAS:** the DOT, as a partner of the FHWA and formally designated by the FHWA to perform certain Section 106 duties on its behalf, and as an applicant for federal-aid highway funds, employs qualified professional staff and consultants capable of completing many of the steps of the Section 106 review and compliance process on behalf of the FHWA, and has established a significant track record of successful and conscientious compliance with Section 106 and 36 CFR, Part 800; and

**WHEREAS:** the DOT, in cooperation and consultation with the FHWA, staff of the SHPO, and the Council, has prepared and adopted a document dated July 2002, and titled “*Procedures for Implementation of Section 106 Requirements*” which describes the process the respective agencies will follow to fulfill the Section 106 responsibilities; said procedures are attached as Exhibit “A” to this programmatic agreement and, by this reference, are incorporated into and made a part of this agreement; and

**WHEREAS:** the procedures of Exhibit “A” and the stipulations of this agreement are intended to recognize and accommodate all existing agreements currently in effect in Iowa between the FHWA, the DOT, and the

SHPO. The agreements (Marsh Arch Historic Bridges Programmatic Agreement, a “Categorical `No Historic Properties Affected’ Programmatic Memorandum of Understanding” of August 1998, and the Nationwide Enhancement Projects Programmatic Agreement [with Iowa Addendum]) will remain in effect; and

**WHEREAS:** with the exception of the preceding provision, the procedures of Exhibit “A” and the stipulations of this agreement are intended to document the agencies’ commitment to adhere to the ‘standard Section 106 procedures’ as prescribed by 36 CFR, Part 800; they do not attempt to establish “Program Alternatives” [to the standard procedures] as allowed by Subpart - C of the revised Part 800 regulations; and

**WHEREAS:** the FHWA in partnership with DOT invited the tribes who may attach religious or cultural significance to historic properties in Iowa to a three-day Iowa Tribal Summit in May 2001, and a subsequent two-day Iowa Tribal Workshop in October 2001, to establish a continued working relationship and mutually acceptable consultation process; and

**WHEREAS:** the DOT has participated in the consultation process, leading to preparation of this agreement and the attached procedures, and has been invited to concur in this Programmatic Agreement (PA); and

**WHEREAS:** the definitions contained in 36 CFR, Part 800.16 are appropriate to define the terms used in this agreement and Exhibit “A”.

**NOW, THEREFORE:** the FHWA, the SHPO and the DOT agree that the purpose of the Programmatic Agreement (PA) is to document the commitment of the FHWA, the DOT and the SHPO to the Iowa process for the benefit of the Iowa parties; it is also to provide documented assurance to other state and federal resource protection agencies having a stake in the protection of historic properties, and with whom the parties regularly interact in the highway project development process, that the process will be followed to a proper conclusion for every applicable federal-aid highway project.

1. This PA sets forth the process by which FHWA, with the assistance of the DOT, will meet its responsibilities under Section 106 of the NHPA and the Act’s revised implementing regulations as set forth in 36 CFR, Part 800, effective on January 11, 2001. This PA shall apply to all FHWA undertakings administered under its federal-aid highway program in Iowa, except those otherwise exempted by existing agreements for historic bridges and minor scale/Transportation Enhancement type projects;
2. The review of FHWA undertakings in the State of Iowa will be administered according to the following stipulations and the procedures of Exhibit “A”, hereto; the SHPO agrees that use of these procedures will satisfy the FHWA’s Section 106 responsibilities for all applicable DOT-administered federal-aid projects:

## **I. PROCESS STIPULATIONS**

The FHWA, with the cooperation and assistance of the DOT, will ensure that the following measures are carried out:

1. **Section 106 and the Iowa Project Development Process:** The parties hereto recognize, and agree, that:
  - a) it is highly desirable to avoid causing adverse effects to significant historic properties and that complete avoidance is always preferable to minimizing and/or mitigating effects; and

- b) it is highly desirable, but sometimes not possible, to fully complete all applicable steps of the Section 106 process before any element of an undertaking is advanced to construction.

*Regarding Item a),* the parties hereto are fully committed to the concept of avoidance whenever possible. When adverse effects are identified, FHWA and the DOT will examine location and design elements of a project in an effort to make revisions that will allow the project to avoid the adverse effect. Accepting minimized impacts, or planning mitigation for impacts that cannot be avoided are considered less desirable courses of action. As required by 36 CFR 800, the parties will continue to make it their practice to consult with the consulting parties in an effort to identify feasible and prudent alternatives that will achieve the desired avoidance where significant historic properties will be subject to adverse effects.

*Regarding Item b),* the FHWA and the DOT are also committed to completing all applicable steps of the Section 106 process for every project subject to 106 review. Project reviews are performed for construction of a facility, the use of borrow sites to obtain needed fill material, and the construction of wetland or other resource mitigation sites in connection with the project itself. When Federal permits, such as those mandated by Section 404 of the Clean Water Act, are required for a project, and have SHPO review and comment as a prerequisite for their issuance, the agencies will make every reasonable effort to complete the Section 106 processing steps prior to applying for the permit.

There are times, however, when this is not possible. Borrow and mitigation site plans often must be developed after the highway project itself is designed and ready for construction. With this scenario, it is not feasible to complete the necessary surveys and obtain comments for these supplemental sites at the same time as for the roadway. The DOT occasionally finds itself in the position of needing to complete Section 106 steps for a mitigation area after it has already done so for the roadway. Yet, the necessary permit covering both elements must be obtained in time to allow construction of the roadway to begin on schedule. In these cases, Section 106 steps for the mitigation area- survey, evaluation, avoidance/mitigation planning, etc.- may need to be taken after an initial permit for a project has been issued.

**2. Initial Processing:** The DOT, in consultation with the SHPO staff, and using consultants meeting the Secretary of the Interior's Professional Qualifications Standards (C-36 CFR, Part 61), and in keeping with the procedures outlined in Exhibit "A," hereto, will perform the work and consultation described in 36 CFR, Parts 800.3 through 800.5 on behalf of the FHWA, as follows:

**A. for 36 CFR, Part 800.3 "Initiation of the Section 106 Process"**

- 1) establish the project as undertaking;
- 2) establish that project has no potential to cause effects on historic properties and that no further obligations exist under section 106; OR
- 3) identify potential to cause effects;
- 4) determine extent of tribal and other public participation warranted based upon scope of project and potential to affect historic properties;
- 5) identify other possible consulting parties.

**B. for 36 CFR, Part 800.4 "Identification of Historic Properties"**

- 1) assess information needs (scope of identification efforts);
- 2) determine and document the 'Area of Potential Effect' (APE);
- 3) locate and identify historic properties;
- 4) evaluate identified properties for historic significance;
- 5) conclude Section 106 upon SHPO concurrence when no historical properties are found by issuing a finding of "No Historic Properties Affected"; and
- 6) assess effects per 800.5 when historic properties are found.

**C. for 36 CFR, Part 800.5 “Assessment of Adverse Effects”**

- 1) apply the ‘Criteria of Effect’;
- 2) prepare the finding of “No Adverse Effect”; and
- 3) consult and coordinate with the SHPO to obtain documented concurrence in the above findings.

**3. No Adverse Effect, or Less:** If consultation with the consulting parties results in a finding of ‘No Adverse Effect’ or less, the DOT will prepare documentation in support of that finding as described in 36CFR, Part 80011(e) and forward it to the SHPO and other consulting parties. SHPO concurrence in the finding will be sufficient to conclude Section 106 consultation for that project without further review by the Council.

**4. Adverse Effect/Failure to Agree:** If consultation results in a finding of ‘Adverse Effect’, or if agreement can not be reached concerning the effects, the work required to conclude the Section 106 consultation process will be completed by the DOT and FHWA as described in 36 CFR, Section 800.6, “Resolution of Adverse Effects.” Written documentation required by 800.6 will normally be prepared by the DOT for use by the FHWA in contacting and involving the Council. Resolution of Adverse Effects includes the following:

- a) notify the Council and determine Council participation;
- b) involving the public as appropriate to the scale of the project, its potential to affect historic properties, and the likely interest of the public in resolving the issues;
- c) continue the consultation with or without Council involvement;
- d) prepare and execute a Memorandum of Agreement (MOA) to document measures to avoid, minimize and/or mitigate the adverse effects; and
- e) refer the matter to the Council if the Iowa parties to the MOA can not agree on its terms.

**5. Tribal Coordination:** As a result of the Tribal Summit and Tribal Workshop, the participating parties agree the DOT will notify the tribes who have an interest in a project area at one or more of the four consultation points during the “Can-Do” project development process [*see Can Do/Section 106 Chart, Attachment 2*].

**Consultation Points are:**

- 1) Identification of the project’s “area of potential effect” (APE) when the project is initiated. Tribes are requested to notify the DOT if there are sensitive areas within the APE that need to be avoided.
- 2) Tribes are provided with prehistoric site information and maps.
- 3) Consultation regarding site treatment of National Register-eligible prehistoric sites affected by the project.
- 4) Tribes participating in an MOA regarding prehistoric sites receive a copy of the final data recovery report.

A Tribal Notification Form accompanies the project submittal to the tribes. The notification form indicates the type of project, type of coordination or consultation, the findings, and requests a response. The form is a self-mailer to facilitate a response [*see Tribal Notification Form, Attachment 3*].

The DOT will be the contact point with the tribes until there has been a determination that the project will adversely affect a prehistoric site, or there is a conflict, at which time the FHWA will become actively involved in the consultation process.

The DOT and FHWA *will complete these steps* and ensure that final review and comments are obtained from the SHPO and other consulting parties. The FHWA, in partnership with the DOT- has the ultimate responsibility (as “Agency Official” under 36 CFR, Part 800 and Section 106 of the NHPA) to ensure these measures are completed. The signatures of the parties to this programmatic agreement attest to their commitment.

## **II. ADMINISTRATIVE STIPULATIONS**

### **1 Emergency Situations**

- A. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of Section 106 and this PA.
- B. These emergency procedures apply only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. FHWA may request an extension of the period of applicability from the SHPO prior to the expiration of the 30 days.

In the event that FHWA proposes an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President or the Governor of Iowa, or to another immediate threat to life or property, FHWA will notify the appropriate SHPO and any Indian tribe that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and afford them an opportunity to comment within seven (7) days of notification.

If FHWA determines that circumstances do not permit seven (7) days to comment, the agency official will notify the SHPO and the Indian tribe and invite comments within the time available. FHWA will take into account any comments received in reaching a decision on how to proceed with the emergency undertaking.

### **2. Dispute Resolution**

Should any party to this agreement object at any time to any actions proposed or the manner in which the terms of this PA are implemented, FHWA will consult with the objecting party or parties to resolve the objection. If FHWA determines within 30 days that such objection(s) cannot be resolved, FHWA will:

- A. Forward all documentation relevant to the dispute to the Council in accordance with 36 CFR, Part 800.2(b)(2). Upon receipt of adequate documentation, the Council will review and advise FHWA on the resolution of the objection within 30 days. Any comment provided by the Council and all comments from the parties of the PA will be taken into account by FHWA in reaching a final decision regarding the dispute.

If the Council does not provide comments regarding the dispute within 30 days after receipt of adequate documentation, FHWA may render a decision regarding the dispute. In reaching its decision, FHWA will take into account all comments regarding the dispute from the parties to the PA. FHWA will notify all parties of its decision in writing before implementing that portion of the undertaking that is subject to dispute under this stipulation. FHWA’s decision will be final.

- B. FHWA’s responsibility to carry out all other actions subject to the terms of this PA that are not a subject of dispute remain unchanged.

### **3. Post Review Discovery**

If historic properties are discovered, or unanticipated effects on historic properties are found after approval of the undertaking, and after construction has commenced, FHWA will:

- a) make reasonable efforts to avoid, minimize, or mitigate adverse effects to such properties;
  - b) determine reasonable actions that it can take to resolve adverse effects; and
  - c) notify the SHPO and any Indian tribe that might attach religious and cultural significance to the affected property within 48 hours of the discovery.
- A. The notification will describe FHWA's assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The SHPO and Indian tribe(s) that have been notified will respond within 48 hours of the notification. The Agency official will provide the SHPO and the Indian tribe(s) a report of the actions when they are completed.
- B. FHWA, in consultation with the SHPO, may assume a newly discovered property to be eligible for the National Register for purposes of Section 106

### **4. Duration**

This executed agreement will be null and void if its terms have not been discussed by the established Cultural Interchange Team (CIT) within a five (5) year time period from the date of its execution. Documented consideration of the agreement will be the basis for it to remain in effect unless it is superseded or is terminated according to stipulation 8.

### **5. Monitoring and Reporting**

Following the execution of this agreement by the CIT, until it may be terminated or superseded, all parties agree to monitoring through the on-going activities of the CIT. Any signatory to this PA may place on the agenda any problems or objections to actions or findings covered under this PA for discussion and resolution at regular or special CIT meetings.

### **6. Special Requirements for Protecting National Historic Landmarks**

If FHWA (DOT) determines that an undertaking may adversely effect a National Historic Landmark, FHWA (DOT) will request the SHPO, Council, and the Secretary of the Interior to participate in consultation to resolve any adverse effects as outlined in 36 CFR, Part 800.10.

**7. Amendments** Any party to this agreement may request that it be amended, whereupon the parties shall consult to consider such an amendment.

**8. Termination** Any party to this agreement may terminate it by providing thirty (30) days written notice to the other parties, provided that the parties will consult during that period prior to actual termination to seek agreements on amendments or other actions that would avoid termination. In the event of termination, FHWA and DOT will comply with the provisions of 36 CFR, Part 800 with respect to the undertakings covered by this agreement.

**9. Regulatory Revisions** In the event that 36 CFR, Part 800 should again be revised by the Council after this agreement is executed, the parties hereto will consult to consider the need to amend this PA accordingly.

### III. EXECUTION and IMPLEMENTATION

The execution and implementation of this Programmatic Agreement evidences that the FHWA has afforded, and is committed to providing the Council with a reasonable opportunity to comment on the undertakings covered by this agreement, and that the FHWA will take into account the effects to historic sites and properties of all applicable federal-aid undertakings in the State of Iowa.

*Signatories:*

#### FEDERAL HIGHWAY ADMINISTRATION

Bobby Blackmon  
Bobby Blackmon, Division Administrator  
Iowa Division

8-13-02  
Date

#### IOWA STATE HISTORIC PRESERVATION OFFICER

Lowell J. Soike  
Lowell J. Soike, PhD  
Deputy State Historic Preservation Officer

8-13-02  
Date

#### IOWA DEPARTMENT OF TRANSPORTATION

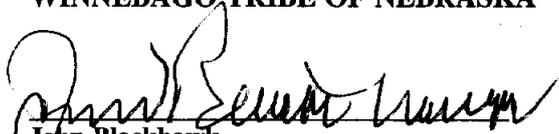
Mark F. Wandro  
Mark F. Wandro  
Director of Transportation

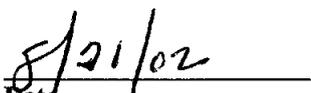
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*PROGRAMMATIC AGREEMENT (continued)*

*Concurring Party*

**WINNEBAGO TRIBE OF NEBRASKA**

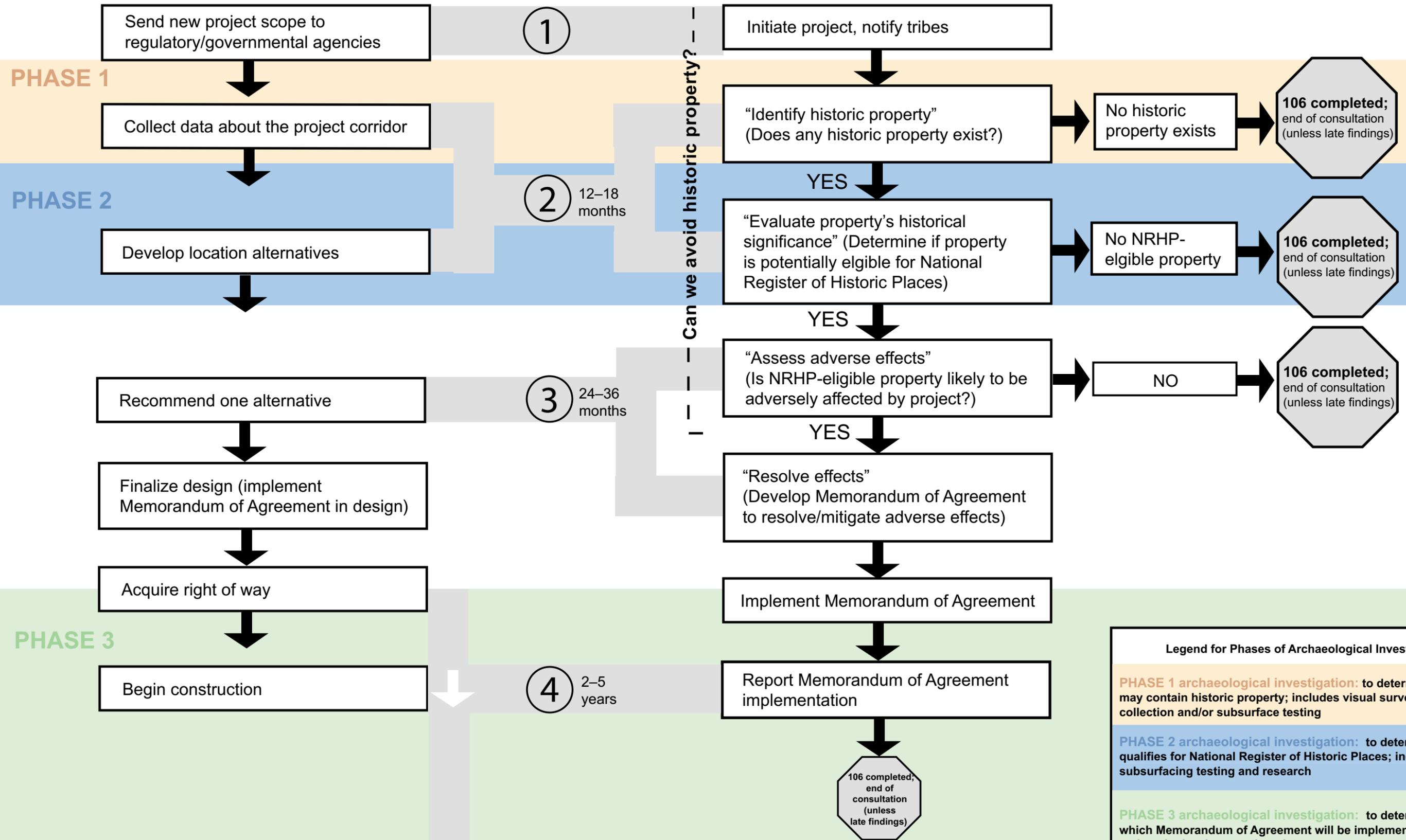
  
John Blackhawk  
Tribal Chairman

  
Date

Iowa DOT'S Project Development  
**“CAN DO” PROCESS**

**“SECTION 106” REVIEW PROCESS**

**106 Consultations**



**Legend for Phases of Archaeological Investigation**

**PHASE 1 archaeological investigation:** to determine if the site may contain historic property; includes visual survey, perhaps data collection and/or subsurface testing

**PHASE 2 archaeological investigation:** to determine if property qualifies for National Register of Historic Places; includes subsurfacing testing and research

**PHASE 3 archaeological investigation:** to determine methods by which Memorandum of Agreement will be implemented; may include archaeological excavation, data recovery



# Iowa Department of Transportation TRIBAL NOTIFICATION

Date \_\_\_\_\_  
IADOT project # \_\_\_\_\_  
Location \_\_\_\_\_  
Description \_\_\_\_\_

IA DOT contact \_\_\_\_\_  
Phone # \_\_\_\_\_  
E-mail \_\_\_\_\_

### Type of Project (see map)

- |  |  |
|--|--|
| <input type="checkbox"/> VERY SMALL - Disturb less than 12 inch depth ( <i>plow zone</i> ) | <input type="checkbox"/> LARGE - Improve existing road from 2-lanes to 4-lanes |
| <input type="checkbox"/> SMALL - Grading on existing road, shouldering, ditching, etc.     | <input type="checkbox"/> LARGE - New alignment                                 |
| <input type="checkbox"/> SMALL - Bridge or culvert replacement                             | <input type="checkbox"/> OTHER   |

### Type of Coordination/Consultation Points

- |   |   |
|---|---|
| <input type="checkbox"/> 1--Early project notification ( <i>project map and description</i> ) | <input type="checkbox"/> 3--Consultation regarding site treatment |
| <input type="checkbox"/> 2--Notification of survey findings ( <i>Phase I</i> )                | <input type="checkbox"/> 4--Final Data Recovery Report            |
| <input type="checkbox"/> 2a--Notification of site evaluation ( <i>Phase II</i> )              |   |

### Type of Findings

- |  |   |
|--|---|
| <input type="checkbox"/> No American Indian sites found<br>--Section 106 Consultation Process ends *   | <input type="checkbox"/> Potentially significant American Indian sites found<br>Phase II evaluation conducted ( <i>see map and list of sites</i> )  |
| <input type="checkbox"/> No significant American Indian sites eligible for National Register<br>listing found--Section 106 Consultation Process ends *   | <input type="checkbox"/> American Indian sites eligible for National Register listing<br>cannot be avoided ( <i>see map</i> )   |
| <input type="checkbox"/> Avoided American Indian sites eligible for National Register listing<br>( <i>see map and list of sites</i> )<br>--Section 106 Consultation Process may or may not end | <input type="checkbox"/> Burial site found<br>_____ # of non-significant prehistoric sites<br>_____ # of potentially significant prehistoric sites<br>_____ # of National Register eligible prehistoric sites |
- \* in the event of a late discovery consultation will be reopened

### Affected National Register Properties

- |   |  |
|---|--|
| <input type="checkbox"/> Investigating avoidance or minimizing harm options | <input type="checkbox"/> Protected         |
| <input type="checkbox"/> Avoided  | <input type="checkbox"/> Data Recovery/MOA |

### \*\*\*\*\* Please Respond \*\*\*\*\*

Who should we contact for site/project related discussions?

Name \_\_\_\_\_ Street Address \_\_\_\_\_ City, Zip Code \_\_\_\_\_  
Phone \_\_\_\_\_ E-mail \_\_\_\_\_

Do you know of any sensitive areas within or near the project the FHWA/DOT should avoid (*please describe*)? \_\_\_\_\_

- |  |   |
|--|---|
| <input type="checkbox"/> Thank you for the information; however, we do not need to consult on this particular project. | <input type="checkbox"/> Thank you for the information. We are satisfied with the planned site treatment. |
| <input type="checkbox"/> We do not have a comment at this time but request continued notification on this project.     | <input type="checkbox"/> We have concerns and wish to consult.  |
| <input type="checkbox"/> Please send a copy of the archaeology report.   | <input type="checkbox"/> We wish to participate in the Memorandum of Agreement for this project.          |

Comments \_\_\_\_\_  
\_\_\_\_\_

Name \_\_\_\_\_ Tribal Name \_\_\_\_\_ Date \_\_\_\_\_

# Exhibit "A"

# **STATE OF IOWA**

## **PROCEDURES FOR IMPLEMENTATION OF SECTION 106 REQUIREMENTS**

*Among the*

IOWA DEPARTMENT OF TRANSPORTATION,  
IOWA DIVISION, FEDERAL HIGHWAY ADMINISTRATION,

*and the*

IOWA STATE HISTORIC PRESERVATION OFFICER

JULY 2002

Based Upon

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*“Protection of Historic Properties”*  
Final Rule: January 2001

Iowa Department of Transportation  
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Office of Location and Environment  
Ames, Iowa

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## **PROCEDURES FOR IMPLEMENTATION OF SECTION 106 REQUIREMENTS**

### **IOWA DEPARTMENT OF TRANSPORTATION HIGHWAY DIVISION**

#### **BACKGROUND**

In January, 2001, the President's Advisory Council on Historic Preservation (**Council**) placed into effect its revised procedures for compliance with Section 106 of the National Historic Preservation Act (**NHPA**). Contained in 36 CFR, Part 800, the new procedures changed the way the federal agencies, such as the Iowa Division of the Federal Highway Administration (**FHWA**), the state historic preservation officers (**SHPO**), and state departments of transportation (**DOT**) respond to the requirements of Section 106 to consider the effects of their undertakings (projects) upon Historic Properties (See Section 800.16(1)(1) for definition).

These procedures document the steps the DOT will follow as it plans and develops state highway improvement projects in Iowa to ensure that the requirements of Section 106 are met. In so doing, the DOT also sets up a formal process under which the local units of government (cities and counties) will develop their projects- if those projects are to be eligible for federal funding participation. These procedures define the process the agencies will follow; they will be formally adopted and agreed by means of a Programmatic Agreement.

#### **OVERVIEW**

In Iowa, there is a partnership among the DOT, the FHWA, and the SHPO staff. The DOT, in consultation with FHWA, conceives the projects and takes them through the various stages of planning and development. This includes consideration of the effects the projects may have upon the human and natural environment, and development of designs that will avoid or minimize negative impacts to these resources. The FHWA provides oversight at key points along the path of project development and grants approvals at major points. The effects of proposed projects upon Historic Properties is one of the various elements of environmental impact that must be considered before a project may be further developed.

The SHPO plays a key role in the Section 106 [Review & Compliance] process. As the official in each state recognized and designated by Section 106 as the appropriate consulting party regarding Historic Properties concerns, the SHPO performs a combination review and compliance, and consultative role in the project development process. The SHPO reviews Historic Properties survey reports received from the DOT for each project and offers comments and suggestions on the significance of Historic Properties identified within the projects' Area of Potential Effect (APE). It either concurs in findings of 'No Effect' or 'No Adverse Effect', requests additional study, or suggests one or more measures to minimize or avoid impacts of the projects to "significant" historic resources.

In the process of overseeing the development of projects and reviewing their possible environmental impacts, the FHWA relies heavily upon the judgment of the SHPO with regard to impacts on Historic Properties and resolution of conflict between the projects and those resources. The parties of this three-way partnership continue to meet bi-monthly, not only to discuss problems associated with specific projects, but also to look at the overall efficiencies and effectiveness of the process they jointly follow. The focus is to streamline the process as much as possible, while ensuring that adequate consideration is given to identification and protection of the resources.

The procedures that follow are based upon many discussions among the parties. They are structured to follow the outline format of the revised (January 11, 2001) Part 800 procedures so that users within any of

the agencies can readily associate process steps specified for the Iowa agencies with the requirements of the federal regulations. The reader is advised to have a copy of 36 CFR Part 800, as reissued effective January 11, 2001, at hand for ready reference when learning or administering the procedural steps below. Copies are available at <http://www.achp.gov/regs.html>

Note that not every section and subsection of the Part 800 regulations is referenced in the left margin of the procedures- only those that require specific interpretation and/or actions by the DOT, FHWA, and/or the SHPO are shown.

Also, be aware that, although the state's procedures that follow attempt to adhere to the order of progression of those presented in Part 800, there are some deviations. These are primarily due to the DOT's Can-Do Project Development Process, which requires that many events in the chain of project development, from planning through construction, overlap or take place concurrently.

## IOWA DOT SECTION 106 PROCEDURES PART 800 — PROTECTION OF HISTORIC PROPERTIES

### Subpart A — Purposes and Participants

**800.1**       **Purposes** — Refer to the regulations for discussion of purposes.

**800.2**       **Participants in the Section 106 Process:** For purposes of administering the Section 106 Process (Process) in Iowa, the list of participants will *always* include:

1. the Iowa Division, Federal Highway Administration (**FHWA**) acting as the *800.2(a) “Agency Official”* and, in some instances, as the *(a)(2) “Lead Federal agency”*;
2. the Iowa State Historic Preservation Officer (**SHPO**) State Historical Society of Iowa, acting as the *(c)(1) “State Historic Preservation Officer”*, a “consulting party;”
3. the Iowa Department of Transportation (**DOT**), Highway Division, Office of Location and Environment, having been delegated the legal responsibility to act on behalf of the FHWA in Section 106 matters with said delegation provided by letter of March 1, 2001, to the SHPO, and acting as the *(c)(4) “Applicant for Federal assistance, permits, licenses, and other approvals,”* also a “consulting party;” and
4. the President’s Advisory Council on Historic Preservation (**Council**), of Washington, D.C., to be involved as defined by the regulations.

**In addition** to the above permanent participants, the following agencies, groups and individuals *may* be involved as additional “consulting parties” for some projects as situations dictate:

1. designated representatives of Indian tribes (at the time of the writing of these procedures, the parties are agreed that there are no formally-designated “Tribal Historic Preservation Officers” (**THPO**) in Iowa as defined by 800.2(c)(2)(A);
2. designated representatives of local (city or county) units of government having jurisdiction over the area in which the effects of an undertaking proposed by the DOT/FHWA may occur, or if they themselves are the applicant for federal aid; and
3. private groups or individuals having an interest by reason of expertise in the subject area, or by reason of ownership or affiliation with a Historic Property likely to be affected by projects proposed by the DOT.

**800.2(d)**       **Plan to Involve the Public - Overview:** In November 1997, the DOT adopted its significantly reorganized project development process, which it labeled the Can-Do process. Can-Do attempts to streamline the planning and design process, with a goal of reducing overall development time, from about ten years down to approximately five to six years. To do so requires consolidation of activities and concurrent completion (or partial overlap) of events. At the same time, the DOT is working to improve its customer service and responsiveness to the public. Increasing effective public involvement in the planning and development processes is a goal of both the DOT and FHWA. Public involvement in Section 106 processing by the parties is obtained by merging the Section 106 requirements with those of the National Environmental Policy Act (**NEPA**).

Many projects are of lesser scale and have correspondingly less potential to affect historic resources. The DOT and FHWA will take these factors into account when deciding upon the level of public involvement that is appropriate for a given project. In addition to project size, scope and complexity, the agencies will consider the likely effects upon resources in the project area, and also the likely level of interest of the public in these effects.

Merging Section 106 requirements with those of NEPA will involve:

**Project Management Team - Public Information Meetings and Scoping:** The DOT and FHWA have sought to identify ways to combine the agency timesaving goals of Can-Do with the increased public involvement requirements of the revised Part 800 regulations. Under Can-Do, a Project Management Team (**PMT**) is formed for each major project. Membership is made up of representatives of the FHWA, the DOT's district staff, the Corridor Development Unit, the offices of Location and Environment, Right of Way, Bridges and Structures and others involved with the development chain of events. The PMT will decide on how much public involvement a given project needs, and plan the schedule of public information meetings and the public hearing accordingly.

The PMT is formed at the very beginning of Location Planning activities (also known as "Planning Studies") and the first public information meeting about a project is held early in evaluation planning. Early meetings are held with agencies involved with historic, natural and other resources to alert them to a new project and gather input about the resources of interest to them that may be found in the project's "Area of Potential Effect" (**APE**). Input is sought from both the agencies and the public on what resources may be found in the project area. Local area amateur archaeological collectors, local historians, county historical societies, and others are a valuable source of information.

**Tribal Role in Public Involvement:** Indian tribes that have been identified as having an interest in Iowa projects are in a unique position. While they need to be informed about upcoming projects by the DOT and FHWA just like the public in general, they also are more likely to be in a position to provide much more information concerning possible historic resources that may be present in the area.

**Public Involvement During the NEPA Process:** [See 800.2(d)(3)] Under Can-Do, shortly after the PMT is formed and the first public and agency scoping meetings are held, a project moves into active "Location Studies" and environmental assessment activities. As required by NEPA, and FHWA's NEPA implementing regulations, performing a complete environmental study requires considerable early coordination with agencies and the public. This step serves both to keep agencies and the public informed about the project's progress, and also to gather information that becomes part of the Environmental Assessment (**EA**) or Environmental Impact Statement (**EIS**) prepared for the project.

The DOT will also contract with qualified consultants who will perform in-depth surveys and analysis of the APE and surrounding project area to identify and evaluate historic resources that may be affected by the project. Written reports on survey results are prepared and are then reviewed by the consulting parties.

The highlights of the historic surveys and reports are included in the NEPA environmental documents, that are then made available to federal, state, and local agencies (through circulation) and the public (through project area libraries and the DOT's central and district offices) for review in draft form. At this point, every interested party has a chance to

provide written input to the DOT and FHWA regarding historic concerns and the project's possible effects on the resources.

***NOTE:** Information concerning the specific location of archaeological sites is to be treated as “confidential” under both Iowa law and Section 304 of the National Historic Preservation Act (see Section 800.11(c) of these regulations), and only those persons with a defined “need to know” can obtain the data. This restriction is particularly applicable to the location of prehistoric burial mounds or other mortuary features. For this reason, the actual Historic Properties survey reports themselves are **not** made available to the public.*

*Following release of the environmental document, a public hearing may be held. The environmental document is available at the hearing. Information pertaining to significant Historic Properties found in the project area (exclusive of confidential portions) is made a part of the formal Project Statement. Attendees have the option of making oral statements at the hearing, or of submitting written comments within 10 days following the hearing. Comments and other input can relate specifically to historic resources, or to many other aspects of a project.*

**Public Comment on Avoidance and Mitigation Measures:** Some projects will unavoidably impact “significant” (in, or eligible for listing in, the National Register of Historic Places [National Register]) Historic Properties. In those cases, the consulting parties will have worked with SHPO to plan ways to minimize impact and to mitigate where necessary. The interested public will be given an opportunity to comment on the finding of significance and on the mitigation measure(s) planned. This information normally will be available by the time of the public hearing.

For historic properties that cannot be avoided, that and are considered to be significant for reasons other than the information that can be recovered from them, a U.S. Department of Transportation Act *Section 4(f) Statement* will be required by the FHWA. The Draft 4(f) Statement is made available for agency and public review for a period of 45 days, with its availability being announced either as a part of the public hearing notice, or by means of a special notice. The 4(f) may either stand alone or be incorporated into an EA or EIS. In either case, agencies, consulting parties and the interested public have an opportunity to comment.

The DOT and FHWA will respond in the final environmental document to any comments received. As needed, DOT and FHWA may conduct additional Historic Properties surveys, enter into consultation with the consulting parties and/or explore additional alternatives for the project based upon comments or new information obtained from the public involvement steps.

**800.2(d)(1) Nature of Public Involvement:** The three pages of discussion that precede this section are based upon the assumption that the agencies are dealing with a major new project of significant size and complexity, and having considerable potential to affect historic resources along its corridor.

**800.2(d)(2) and (3) Providing Public Notice; and Use of Agency Procedures:** Consistent with Section (d)(1), above, and except where precluded by the confidentiality concerns of any tribes involved, the confidentiality concerns of Section 800.11(c), and the Code of Iowa, the DOT and FHWA will provide the interested public with information about a project and its potential effects on historic resources. They will provide the information using existing agency procedures described in the “Overview” to 800.2(d), preceding. The parties will

solicit the public's input and comment on the significance of the resources identified and on the expected effects of the project upon the resources.

**Public Involvement in Local Systems Projects:** City and county engineers are under the same obligation to protect historic resources as are the FHWA and the DOT whenever their projects are developed with the anticipation that federal funds, license(s) or permit(s) will be involved in the project. Their project corridors must be surveyed in the same manner as are the state's, and the consulting parties must review and comment upon a project's expected effects on historic resources before the project may proceed.

Because local systems projects are usually more limited in size and complexity, the extent of public involvement in the Section 106 process will be scaled down proportionally. Like the state, the local officials will need to make full use of their existing processes for public involvement to inform the public about the results of Historic Properties surveys, any adverse effects expected, and any plans developed to minimize or avoid those impacts.

If a local project should involve a significant Historic Property that one or more Indian tribes have identified as having religious or historic significance to them, the city or county engineer having jurisdiction over the project will coordinate with the DOT and FHWA to involve the tribe(s) in consultation to resolve the adverse effects. Like the state, those officials must also be aware of confidentiality concerns of the tribes and ensure that sensitive information is not publicized.

## Subpart B — The Section 106 Process

### 800.3 Initiation of the Section 106 Process

**800.3 (a) Establish as Undertaking:** Section 800.3(a) requires the *Agency Official* (in this case, FHWA) to determine whether a project proposed by the DOT qualifies as an "undertaking" for purposes of these procedures and as defined by 800.16(y). As defined in that section, an "undertaking" is any action proposed for development with federal involvement. That involvement may include financing, permitting, licensing, administration, or other project approval steps. For Section 106 processing purposes, it is the policy of the DOT to plan and develop all of its highway improvement projects as potential federal aid projects so that, from a Section 106 standpoint, they will be eligible for federal participation in the cost of their construction- if that participation is so desired.

**800.3(a)(1) No Potential to Cause Effect:** Exhibit "A" of these procedures is a copy of a "Categorical No Historic Properties Affected Programmatic Memorandum of Understanding (PMOU) as executed by the DOT, the FHWA, and the SHPO in September 1998. By agreement, any DOT/FHWA project that satisfies the criteria contained in the PMOU as a "non-affecting" project has no potential to result in effects upon historic resources, and is considered to be exempt from the need for further Section 106 processing. To achieve the goal of developing all projects to be eligible for federal funding from a Section 106 standpoint, the Office of Location and Environment (OLE) will evaluate all proposed projects early in their development to determine if they have the potential to affect Historic Properties. Those that meet the criteria of the PMOU will not require further Section 106 evaluation. For such projects, **Section 106 processing is complete.**

**800.3(b) Coordinate with Other Reviews:** Here, the regulations suggest that the Agency Official should coordinate the Section 106 review of a project with reviews required by other laws, such as the National Environmental Policy Act, Section 4(f), and others. It is the goal of

the DOT and FHWA that the Section 106 process: **1)** be consistent with the regulations of the National Environmental Policy Act (NEPA); and **2)** be initiated early enough in the planning and development of a project that substantive information about the project's anticipated effects on historic resources can be included in the Environmental Assessment, Environmental Impact Statement, or whatever document is prepared appropriate to the scope of the project. That means that surveys, SHPO review, consultation, mitigation planning, etc. need to occur in advance of the anticipated date of release of these documents so that they will contain adequate coverage/discussion of the Section 106 situation.

**800.3(c) Identify Appropriate SHPO and THPO:** The SHPO is the appropriate office for review of projects planned for Iowa. The SHPO is not staffed or funded adequately to actually perform studies or surveys of projects, nor is it their responsibility under Section 106 or the Code of Iowa to do so. The DOT (and other applicant agencies) must do the work, have the results put into a written report and submit same to the SHPO for review and comment.

**800.3(c)(1) THPO Assumption of SHPO Duties:** As mentioned in the Overview, the participants to the Section 106 process in Iowa have established that there currently are no formally designated Native American (Indian) Tribal Historic Preservation Officers (THPO) in the state. There are recognized spokespersons for various tribes, and these are to be contacted by the FHWA and DOT as described in Sections (d) and (f), following.

**800.3(c)(2) Undertakings Across State Lines:** In the case of projects involving links to adjoining states, their SHPO is also involved. If an agreement has been executed for a given project between the parties of both states in which one of the SHPOs has been designated "Lead SHPO," then that SHPO will coordinate and consult directly with the DOT and SHPO of the adjoining state. If no such agreement has been reached, the DOT of the involved adjoining state will have the responsibility for submitting materials to their respective SHPOs, reviewing sites, arranging consultation, etc.

**800.3(d) Consultation on Tribal Lands:** There are three Indian tribes with tribal lands wholly or partially contained within Iowa's borders. The DOT and FHWA will consult with these tribes any time a project is expected to directly or indirectly involve these lands. The procedure for initiating contacts with the tribes will be as discussed in Section (f), "Identifying other consulting parties," below. The tribes are:

- Mesquakie (Sac & Fox of the Mississippi of Iowa) .....Tama County
- Omaha Tribe.....Monona County
- Winnebago Tribe.....Woodbury County

**800.3(e) Plan to Involve the Public** - Refer to the discussion in Section 800.2(d) beginning on page 4 of these procedures.

**800.3(f) Identify Other Consulting Parties:** The “standard” consulting parties for Iowa projects are the DOT, the FHWA, and the SHPO. Any of these three may identify other parties that have an interest in a particular project and need to be invited to become involved. These are identified in the section on Section 106 “participants”, found in Section 800.2(c). Note that, although the regulations of Part 800 continually designate the Agency Official, in this case FHWA, as the party with the responsibility for taking most of the required actions under Part 800, the DOT, as the project sponsor or applicant, in partnership with FHWA and in consultation with designated delegates, will perform many of the steps. The early coordination steps outlined above will include contact with the interested tribes, agencies, local officials and the public that may have an interest in sites and properties protected by Section 106. Part of the DOT’s contact with them will include a request for information about historic resources to be found within or near the project corridors.

The Office of the State Archaeologist (OSA) is to receive informational copies of all correspondence, reports, and other documents pertaining to findings of effect, adverse effect, and mitigation proposals

**800.3(f)(2) Indian Tribes:** The DOT will prepare contact letters to be sent directly to the tribe(s) listed in Exhibit “C” that may have an interest in a proposed project. These tribes and their areas of interest have been identified through (1) reference to the Native American Consultation Database (NACD) maintained by the U.S. Department of the Interior’s National Park Service, (2) consultation with the SHPO and the OSA, and (3) consultation with various area tribes. The contacted tribe will be invited to become a “consulting party” for Section 106 purposes and, if the tribe so requests same in writing, it shall become one.

**800.3(f)(3) Requests to Be Consulting Parties:** The DOT and FHWA will consider granting “consulting party status” to any interested individual, group, organization, or Indian tribe who makes a written request to be such a party. The parties will consult with the SHPO, and any Indian tribe upon whose tribal lands an undertaking occurs or will otherwise affect historic properties of concern to them, to determine which consulting party requests should be granted.

## **Identification, Evaluation, and Treatment of Historic Properties: An Overview of the Iowa DOT Process**

### ***Introduction***

Sections 800.4, 800.5, 800.6 and 800.7 of the Section 106 Regulations and these Iowa Procedures address “Identification [and evaluation] of Historic Properties,” “Assessment of Adverse Effects,” “Resolution of Adverse Effects,” and “Failure to Resolve Adverse Effects,” in that order. The following Overview, which precedes the more detailed discussions of these sections for the Iowa parties, is presented first to give a general look at the Iowa process, from identification of historic properties to resolution of adverse effects. A more in-depth discussion of each stage of the process in Iowa begins with **800.4**, following the Process Overview.

***Agency Coordination***

The Iowa DOT, the FHWA, and the Iowa SHPO have worked in close cooperation since the early 1970s to establish and follow procedures for the advancement of highway (and other transportation) improvement projects that respond to current requirements of the Section 106 regulations as those regulations have evolved. Beginning in 1989, the parties have met approximately bi-monthly to coordinate their efforts and ensure that their process is as responsive to the Section 106 requirements as possible, while also minimizing processing time and project delays.

These meeting sessions are continuing into 2002 as the parties work to modify, improve and document their procedures in response to the current Section 106 requirements embodied in 36 CFR Part 800, effective January 11, 2001. Development of these procedures has also included active participation of consulting firms key to the Iowa DOT's ongoing historic properties management program. The following paragraphs discuss the Iowa process.

***The Process Overview***

When the parties to be involved in a project's historic resource processing have been identified, it is time to determine the project's area of potential effect (APE), identify the resources, evaluate their significance, and determine the project's impact on them. The DOT, in conjunction with the FHWA, has developed a process to address these steps that is designed to ensure that the various tasks involved are initiated and carried out in a timely manner so that the project's desired development and construction schedule can be met, while ensuring that thorough consideration is given to protection of significant historic resources.

The DOT and the SHPO have reached agreement on methodology for determining any given project's APE on Historic Properties. The determination process is summarized in the table included in the discussion of Section 800.4(a)(1), following this overview. Once the APE has been established, resource identification can proceed. Identification involves field surveys, site records searches, and consultation with parties having knowledge of historic properties in the project area.

At the time of this writing, the DOT does not have the in-house capability to conduct its own Historic Properties surveys. The Department relies exclusively upon the work of qualified consulting firms and institutions to complete the needed surveys and prepare the reports. This approach has been very successful and will be continued, with occasional refinement to the methodology of contracting.

For convenience, and to keep the SHPO and other consulting parties properly involved at the appropriate steps, the process adopted by the DOT and recognized by most historic resource consultants, usually divides the survey and reporting process into phases. Archaeological surveys will be conducted in accordance with the SHPO's *Guidelines for Archaeological Investigations in Iowa*, December 1999. Historical surveys will use the *Iowa Historic Property* reporting forms. All surveys and reports will conform to the Secretary of the Interior's Standards for surveys and reports. The usual phases are described as follows:

**PHASE 1A - Reconnaissance Survey:** Phase 1A is intended to locate and identify Historic Properties. It may only confirm previously identified sites and estimate the potential of the project area, or it may also locate new, previously unknown sites and properties, and it will confirm the location of sites previously discovered. It is primarily a visual examination of a project location, or corridor, involving a pedestrian survey of the ground surface and/or exterior inspection of standing structures. The visual examination is preceded by a background search of the area's history and the results of any previous surveys performed.

**PHASE 1 – Intensive Survey:** If surface visibility is limited by crops or other ground cover, or if soil surveys indicate the potential for buried soils containing prehistoric living surfaces, then systematic surface probing and shovel testing will be used to increase confidence in survey results. Phase 1 surveys are documented in a report that conforms to format and content guidelines as established in *Guidelines for Archaeological Investigations in Iowa* (1999) and that is intended to convey the results of the survey to the project reviewers. Reports are always submitted by the consultant to the DOT, which checks them for format and content accuracy and then forwards them to SHPO and other consulting parties as appropriate for review and comment. On minor projects, the reports on historic structures and prehistoric archaeological components will be combined; on major projects with multiple sites and properties located, the reports will normally be separate to facilitate SHPO staff review.

**PHASE 2 - Determination of Significance:** For archaeological sites located during the Phase 1 survey and that the consultant recommends as being potentially significant, a Phase 2 Test/Evaluation will be performed to establish the resource’s significance. The “test” is to see if the site or property possesses the features and historic integrity to determine its eligibility for listing in the National Register of Historic Places. Sufficient data must be collected to support a data recovery plan that is based on and reflective of feature density, horizontal and vertical density, culture, and time period. For prehistoric sites, Phase 2 involves subsurface studies through post holing, shovel testing, and/or the excavation of test pits at strategic locations within the site.

Again, a report is prepared and submitted through DOT to the SHPO and other consulting parties for review and comment. The consultant will have made a recommendation as to National Register eligibility for each site or property tested, and the SHPO will concur or not concur in its comments.

For historic structures and properties, Phase 2 is usually included in the Phase 1 field work for greatest efficiency and time saving. It involves more extensive research into the interior and exterior architectural features of the structure and/or review of the ownership history and the role of the property in the historic growth of the area in which it is found. The results of the test are combined into the Phase 1 report.

**PHASE 3 - Data Recovery and Documentation:** Data recovery and Documentation are forms of mitigation for adversely affected archaeological sites and historic properties, respectively, and as such, come later in the Section 106 process. Within the project development time-line, it normally follows consultation and execution of a Memorandum of Agreement (MOA) among the consulting parties. However, it is discussed here because it is last of the “phases” of the Section 106 process referenced above. For more about MOAs, refer to the discussion for Section 800.6(c).

Resources that have been determined eligible for the National Register are afforded a high level of protection under FHWA’s environmental processing regulations and procedural guidelines. All state DOT’s are required by the U.S. DOT’s Section 4(f) Law to avoid impacting significant historic resources if at all possible. If they cannot be avoided, the agencies must do all possible planning to minimize harm to the resource. The agencies must mitigate the impacts that cannot be avoided.

*Data Recovery:*

For archaeological sites of value **only** for the information they contain, “mitigation” means excavating the site to “substantially recover” the scientific data contained within. A Data Recovery Plan (DRP) will have been prepared and approved by the consulting parties in advance of the beginning of recovery.

*Documentation:*

For historic structures, Phase 3 mitigation usually starts with consideration of the question, “Can the structure be moved without destroying its historic integrity?” Although moving still results in a

finding of ‘Adverse Effect,’ it is preferable to demolition. If preservation is not feasible through moving, recording the visual and historical features of the structure through the process known as “documentation” prior to demolishing it is the chosen mitigation measure. Photography, archival research, and written narrative describing the architectural features (if any) that make the resource historically significant are all a part of documentation.

For both prehistoric and historic properties, reports are prepared and, again, they reach the SHPO and others through the DOT’s Office of Location and Environment (OLE).

**Other Forms of Mitigation:** Mitigation planning often takes the form of negotiation among the consulting parties. The parties have made increasing effort in the last few years to be as creative as possible in their planning. The SHPO has encouraged creative additions to the straight ‘recovery of archaeological’ data and ‘documentation’ of historic structures. Public interest booklets produced by qualified consultants have been prepared for several historical projects and have received good response from the interested public.

This concludes the overview of the Iowa process for identification, evaluation, and mitigation. The specific tasks to be performed in response to the various requirements of the Part 800 regulations are as follows:

#### **800.4 Identification, Evaluation, and Treatment of Historic Properties**

**800.4(a) Determine Scope of Identification Efforts:** Once it has been established that a project is an “undertaking,” the appropriate parties, including tribes, to be involved are identified, and the public involvement activities planned as required by part 800.3, the DOT will begin the critical phase of identifying known or potentially significant Historic Properties that the project may affect. The extent to which any project will affect the resources is directly related to the size and work scope of the project. The projects range in scope from simple shoulder widening or pavement patching to full construction of four-lane divided facilities on new location.

The regulations require that the project sponsors consult with the SHPO (before resource surveys are started) so that agreement may be reached as to what the scope of impact identification should be. Given the number of projects being advanced by the DOT each year, this step becomes time-prohibitive if done one at a time for individual projects. The parties hereto have therefore agreed upon the following systematic approach to establish the scope of identification effort that will be required.

**800.4(a)(1) Determine and Document the Area of Potential Effects (APE)** The parties have agreed to the criteria shown in the table below as a practical means of identifying the APE of the many types of transportation improvement projects proposed by the DOT. Once the APE is known, the scope of identification effort can be readily identified. In the table, the left column presents the various types of projects based upon size and scope; the right column presents the criteria for determining the corresponding APE. Agreement by the parties with the criteria in the APE Table, as evidenced by their signature upon the enabling Programmatic Agreement adopting these procedures, is intended to satisfy the requirement for consultation with SHPO to determine the scope of effort required. The reader is referred to Section 800.16(d) for a more detailed definition of APE.

### Area of Potential Effect (APE) Determination

Process Project Type	APE Criteria
bridge replacement (with minimum approach work) culvert replacement (with minimum approach work) minor widening, adding turning or climbing lanes, intersection improvements, shouldering, ditching for snow storage. horizontal or vertical curve re-alignment two-lane reconstruction on existing alignment-rural or urban four-lane construction on existing alignment two or four-lane relocation	(1-7) Length & width of construction; plus channel changes, permanent & temporary construction easements, potential future alignment changes, wetland mitigation and borrow areas; include immediately adjacent known or potentially known sites  (6-7) * any potential <i>additional</i> APE to be determined in consultation with SHPO on a case-by-case basis e.g.: changes in project view shed, access, secondary impacts, etc.

The above criteria can normally be applied to all projects that will require either additional right of way, or Temporary and/or Permanent Easements, or both. As initially drawn during the Phase IA Reconnaissance Survey, the APE will take into account any known significant sites or properties in the project area. If additional, previously unknown sites or properties are discovered during the Phase I Intensive Survey within the initial APE, the parties, in consultation with SHPO, will determine if the initial APE needs to be shifted, enlarged, or otherwise changed to adequately reflect the extent of the new discovery (discoveries). For standing structures, visual impacts to and from view sheds associated with the new discovery will be considered if the parties find it necessary to redefine the APE.

**800.4(a)(2) Search of Existing Information:** As the DOT goes about its process of identifying and evaluating Historic Properties through the use of qualified consultants, it has been, and will continue to be, standard operating procedure for these consultants to perform a thorough search of the literature- both printed and electronic sources-, the Iowa Site File at the OSA, the file records of the SHPO and other background literary sources as a preface to ALL project area field investigations. The search will be concentrated upon known sites and properties, but will also focus on any data concerning possible Historic Properties that have not yet been identified and evaluated. If a search finds that burial sites (including mounds) are recorded within or adjacent to the project boundaries, consultation with the OSA Burials Program is needed in addition to other consulting parties.

**800.4(a)(3) Other Sources of Information:** In addition to literary sources, the consultants will seek out and interview local amateur collectors and historians in the project area , plus other “interested parties” who may have information relevant to historic resources in the area. Agencies and local organizations such as county historical societies will be included in the data gathering preceding or during the field work phase. The names of all such external sources of information, the date of contact with them, and a summary of the information gathered will be included in the consultant’s report to the DOT on the results of its investigations.

**800.4(a)(4) Tribal Sources of Information:** It is essential to keep the appropriate Indian tribe(s) who have been identified as having an interest in a project area informed and involved in the Section 106 processing for the project. Initial project-related contacts with the affected tribe(s) are made through the DOT. Subsequent communications with the affected tribes on a given project, may be accomplished by providing them copies of correspondence between the DOT and SHPO.

In addition to the project-specific information provided by the agencies to the tribe, the tribe, in turn, will be asked to provide information about known or potential prehistoric resources in the project area. However, confidentiality, particularly for mortuary sites, is a primary issue with all tribes and will, at all times, be respected by the parties to this agreement as they attempt to make contact and exchange information.

**800.4(b) Identify Historic Properties:** Since 1970, the DOT has successfully obtained its needed Historic Properties data from a growing network of qualified consultants. Under this process, the DOT assigns projects to contracted consulting firms and institutions as projects enter the planning stage of development. The consultant performs the necessary surveys—both prehistoric and historic—and prepares a report. Reports are forwarded to the DOT’s OLE where they are checked for format and content. DOT then submits the reports to the consulting parties for review and comment. If significant Historic Properties have been identified by the consultant, and the SHPO concurs in the findings, additional consultation among the parties, and any affected tribes, will be performed as described later in these procedures.

The DOT includes provisions in its contracts for historical resources consultant services that require the consultant to gather the preliminary background information as described in 800.4(a) above as a preface to its field work in a project area. In accordance with the aims of the Can Do process, the DOT’s OLE assigns projects to its historical resources consultants at the appropriate time in a project’s development time line such that the data required will be available to planning and design staff for consideration early in their work efforts.

The consultant gathers the preliminary data, performs the surveys, writes the report, and submits it to the OLE, who reviews it for completeness and, if acceptable, forwards the report to the SHPO and other consulting parties for review and comment. Within the 30-day window allotted to them, the consulting parties review the report and respond to the DOT as appropriate, either concurring in the consultant’s conclusions with respect to the project’s expected effects upon historic resources, requesting additional surveys/information, or requesting consultation to resolve specific issues of conflict between the project and significant sites or properties.

**800.4(c) Evaluate Historic Properties:** As described in the preceding process overview, all identified sites must be evaluated for significance: i.e., are they eligible, either individually or collectively as a district, for inclusion in the National Register of Historic Places (NRHP). It is part of the role of the consultant in the DOT’s process to present written description and evaluation of the sites and properties identified in its report(s) on the project surveys. Some sites or properties are quite clearly either eligible or not eligible based only upon the results of the Phase 1 survey. Others will require the additional information that a Phase 2 Test can provide before the determination can be made with confidence by the SHPO.

For historic/architectural sites, and because of the applicability of Section 4(f) of the U.S. DOT Act, it is highly desirable to combine the Phase 1 and Phase 2 work into a single survey. The DOT’s Can Do process envisions this being done to reduce project development time. The combination is possible because research for historic sites typically involves much less “on-site” work, but much more literary records work. This contrasts with prehistoric archaeological work, which is highly site dependent and so requires

extensive commitments of time, money, and worker resources to complete. It is prudent, with these, to make sure that the site likely is significant, and to have the SHPO's concurrence in that finding before a Phase 2 level of effort is undertaken.

***NOTE:** Sections 800.4(c)(1) and (2), as with other sections of the Section 106 regulations, refer to the Agency Official as the party applying the National Register criteria of significance and criteria of effect. By definition in the regulations (Section 800.16), this refers to the federal Agency Official, in this case, the FHWA. As referenced in the discussion for 800.2(3) on page four of these procedures, the DOT has been delegated by the FHWA to perform many of the tasks of the Section 106 process on its behalf. Although the DOT may perform the tasks, the FHWA still retains overall responsibility to see that functions assigned to the [federal] Agency Official are performed properly and timely.*

*By agreement among the parties involved in the Section 106 process for transportation in Iowa, the DOT has the responsibility to receive the survey information, review it, and forward it on to the SHPO and other consulting parties. The reports identify resources, evaluate the project's effect on them, and offer the consultant's preliminary assessment of their significance. The consulting parties have the responsibility to review the findings of the consultant and provide comment to the DOT. By means of these shared responsibilities, the parties have collectively ensured that FHWA's responsibility to act as the Agency Official in these matters is fulfilled.*

*In those rare cases where the SHPO and the FHWA, acting as Agency Official cannot reach agreement on the National Register eligibility of a resource (per 800.4(c)(2), the FHWA will request a determination of eligibility for the resource from the Secretary, U.S. Department of the Interior (DOI). This responsibility is delegated by the Secretary to the Keeper, National Register of Historic Places, a function of the DOI's National Park Service.*

**800.4(d) Results of Identification and Evaluation** The activities of subsection (c) where project locations and corridors are examined by qualified consultants, resources are identified, and determinations of significance are reached leads to two fairly obvious next questions: 1) *Are there any significant historic properties in the project area; and, 2) if yes, is the project (undertaking) going to affect them?* These are crucial questions for their answers directly affect the future of the proposed project. The point where these questions are asked also represents the first plateau in the Section 106 process where the FHWA and DOT will be required to stop and provide official notice to the public, including interested Indian tribes, that the process is happening for the project, and what the results and conclusions are to this point. These issues are covered in the following two subsections.

**800.4(d)(1) No Historic Properties Affected:** If the DOT's surveys find that *either* there are no significant Historic Properties present in the project area, *or* that there are properties in the area, but the project is not going to affect them, then the DOT is required to "provide documentation of this finding" to the SHPO and to all consulting parties, including the tribe(s), as defined in 800.3. DOT will also make the project documentation available for public inspection before giving any major approvals that would advance the project in its development.

By agreement the DOT performs these tasks, in consultation with FHWA as necessary. The OLE addresses a letter to the SHPO announcing the results of work to this point in the

Section 106 process. It provides copies of the letter of notification to the interested tribe(s). The letter either transmits actual copies of the documentation, if practical, or advises that it is available. The letter to the SHPO states the finding made by DOT that ‘no historic properties will be affected.’ That finding is appropriately documented and the SHPO and the tribes have 30 days in which to respond; the SHPO may either concur in the finding or object to it, giving its reasons.

The public also must be informed of the findings and given an opportunity to comment on them before the project can advance further in development. Here, the parties intend to make as much use as possible of processes already in place to notify the public about its project activities and solicit its input. Refer to previous discussion in Sections 800.2(d) on public involvement and 800.3(b) concerning ‘coordination with other reviews.’

When they are published for the DOT’s own projects, notice of the findings will be added to already-planned public notices in newspapers announcing project-related events such as public information meetings, public hearings, or environmental documents publication and availability. If other such notices are not available timely, then a special notice dedicated to the Section 106 findings will be published in newspapers located in the project area. As appropriate, the notices will direct potentially interested readers to contact either the DOT’s District Office having jurisdiction over the project, or the OLE at Ames.

***NOTE:** For Local Systems projects, similar newspaper notices will be used. In addition, city and county engineers will also make an effort to make maximum use of other existing opportunities to notify the potentially interested public about the findings of the Historic Properties survey. These can include, as available, inclusion in notices for the activities of other public agencies, such as the official minutes of meetings of the county board of supervisors. The notice(s) would announce the survey and findings results, and direct interested persons to the applicable city or county engineer’s office to view copies of the documentation.*

*All parties: the SHPO, the public and the consulting parties, including the interested tribe(s), will be granted a 30-day period in which to comment on the findings. Sufficient time in addition to the 30 days to allow for less-than-daily news publications and mailing times will be added to the basic 30 days. It is understood that these are calendar days. If, at the end of these 30+ days, there have been no objections raised, then Section 106 has been completed and the project may proceed.*

**800.4(d)(2) Historic Properties Are Affected:** If it is determined that the surveys and SHPO consultation process have shown that there *are* significant historic sites or properties that will or may be affected by the project, *or* if the SHPO and/or Council objects to a finding that none will be affected, then the FHWA and DOT will notify all consulting parties, including the tribe(s), and the public using previously described means to reach the interested public. (Also see Section 800.5(a).)

The DOT will draft and send the letters to the consulting parties. The consulting parties letter will discuss the project situation with respect to Section 106 and invite recipients to comment, either upon the question of a particular resource’s eligibility for the register, or upon the question of whether the project may affect the resource, or both. The letter will ask that any responder who believes that an eligible resource will be affected also address

the question of whether or not the affect to the resource is *adverse*. This is preliminary to Section 800.5, following, which addresses the issue of assessment of adverse effects.

A 30+ calendar day period for return of comments will be granted to all those parties contacted. With or without responses from the consulting parties, the FHWA and the DOT will proceed to enter into consultation with the SHPO (and the Council if they are involved) to identify ways to resolve the conflict.

## **800.5 Assessment Of Adverse Effects**

**800.5(a) Apply Criteria of Adverse Effect:** Having found that there are one or more significant Historic Properties present in the project area, and having determined that at least one of them will be affected by the project, the next step is to determine whether the effect is adverse to the resource(s). The DOT, will apply the “**Criteria of Adverse Effect**” as found in Section 800.5(a)(1)and(2) of the new regulations. In making their decision, the parties will consider any comments previously received from consulting parties, including the tribe(s). Note that the regulations specify that the criteria of adverse effect are to be applied to resources that are located within the project’s APE.

If the initial indication of the criteria application is that the effect may be adverse, then the DOT shall consult with its design representatives to determine whether the effect can be minimized or eliminated through adjustments to project location and/or design. The goal will be to eliminate the effect, or reduce its impact to the point where, based upon the criteria, it can then be judged ‘not adverse.’

**800.5(b) Finding of ‘No Adverse Effect’:** The DOT, will conclude that a finding of no adverse effect is appropriate for a particular project and its affected resource when either **1)** the projects effects *do not* meet the criteria of Section 800.5(a)(1), or **2)** they initially do meet the criteria, but the location and/or design of the project can be modified by the DOT in such a way that the effects will no longer meet the criteria.

**800.5(c) Consulting Party Review:** If the DOT, in consultation with SHPO, is able to conclude that there will be no adverse effect, either initially or following project modification, then the parties will notify all consulting parties, including tribes, of the finding, provide copies of any key documentation developed in conjunction with the finding, and request comments. Again, refer to Section 800.3(b) for discussion of ways the agencies will endeavor to blend these Section 106 notifications to the public with notifications/reviews of other environmental information for a project.

**800.5(c)(1) Agreement with ‘No Adverse Effect’ Finding:** The SHPO will have 30 days *from its receipt of the notification* to return a response to the DOT. If SHPO responds within the 30 days that it concurs with the ‘no adverse effect finding,’ then Section 106 processing is considered completed at that point, and the project may proceed. If no response is received from the SHPO within the 30-day period, then the parties may *assume* SHPO concurrence, and the project may proceed.

**800.5(c)(2) Disagreement with ‘No Adverse Effect’ Finding:** If the SHPO, or any of the established consulting parties disagrees, and files its response with the DOT and FHWA within the 30-day review period, then further consultation between the parties must be undertaken to resolve the disagreement to the satisfaction of all concerned. If the consultation fails to

resolve the disagreement, the FHWA will contact the Council and request that it review the finding. See Section 800.5(c)(3), below.

**800.5(c)(2)(ii) Tribal Disagreement with Finding:** If a tribe that has been recognized as a consulting party (by virtue of having advised the DOT or FHWA that it attaches religious and cultural significance to a site subject to the ‘no adverse effect finding’) has objected to the finding, then that tribe must specify the reasons it objects, and it may choose to request that the Council review the finding if the FHWA has not already done so.

**800.5(c)(3) Advisory Council Review of Finding:** When the FHWA contacts the Council to request its review of the disputed finding, it must include copies of certain documentation required by Section 800.11(e) of the new regulations. (Refer to that section of the new regulations for details.) If the correct documentation has been supplied to the Council, it must, under the regulations, review the ‘no adverse effect’ finding and notify the FHWA of its decision as to whether it believes the adverse effect criteria have been correctly applied within 15 days of receipt of the materials; it must specify the basis for its decision.

When the Council has taken the above steps, the FHWA will proceed in accordance with the Council’s determination with respect to the project. If the Council has not contacted the FHWA within the allotted 15 day time period, the DOT and FHWA may *assume* the Council’s agreement with the finding, and the project may proceed.

**800.5(d) Results of Assessment of Project Effects:** The DOT, will maintain a complete file of the activities relating to the surveys and ‘no adverse effect’ finding and make copies of same available to the interested public upon request. **However**, the parties will limit the information it provides to the public to respect and comply with the confidentiality requirements of both 800.11(c) of the Section 106 regulations and applicable Iowa State Law. Specifically, no information pertaining to the location of archaeological sites—especially prehistoric burial features, or other sites known to have religious or cultural significance attached to them by the tribes—will be released to the public. All employees of the DOT, the FHWA, and the SHPO will, at all times treat this type of information with the utmost respect and confidentiality.

*NOTE: It is the policy of the Iowa DOT that archaeological site location information will only be provided to professionals with a demonstrated ‘need to know’ for purposes of ensuring DOT compliance with the applicable environmental laws. Any questions about the release of such information will be referred to the Iowa Office of the State Archaeologist, which has the statutory responsibility to protect the confidentiality of the locations of prehistoric burials and other archaeological sites information under Iowa law.*

*If the DOT decides to revise a project that has received a ‘no adverse effect’ assessment finding as originally proposed, the 106 process must be repeated should the project be modified in location or design. If major changes are being made in the scope and/or location of the project, it may be necessary to revisit the step of defining the project’s APE in consultation with the SHPO. The need for this step must be judged on a case-by-case basis*

**800.5(d)(2) Finding of Adverse Effect:** If the result of the assessment of the project’s effects upon the resource(s) is that there *will* be an adverse effect, then the FHWA and DOT will continue

Section 106 consultation with SHPO and other consulting parties as outlined in Section 800.6, following.

## **800.6 Resolution Of Adverse Effects**

**800.6(a) Continue Consultation:** For those projects where it has been established that a project will have an adverse effect on a Historic Property that has been found to be significant, the parties first goal must be to look for ways to avoid or minimize the effect. The FHWA, acting through the DOT, will continue consultation with the SHPO, any involved tribes, and any other consulting parties to identify and evaluate location and/or design modifications to the project that would avoid, minimize, or mitigate the adverse effects.

The DOT's Office of Location and Environment (OLE) will take steps internally to contact and request input from all offices that are involved in the location and design of the project. If a PMT (Project Management Team) has been assembled, it will be asked to review the conflict and make recommendations for possible project changes that would lessen or eliminate the effect.

**800.6(a)(1) Notify the Advisory Council and Determine Advisory Council Participation** Using a letter and documentation prepared by the OLE, the FHWA will contact the Council and inform it of the 'adverse effect finding' for the project. The contact letter will transmit the 'documentation' required by Section 800.11(e) of the regulations. It will invite the Council to participate in the consultation any time one or more of the following conditions apply:

- A. the FHWA has determined that it desires the Council's participation;
- B. the adverse effect will be upon a *National Historic Landmark*;
- C. a Programmatic Agreement, as provided for under Section 800.14(b) of the regulations, will be prepared; or
- D. an Indian tribe or other consulting party has requested the Council's participation.

*NOTE: A tribe or other consulting party may independently request the Council's participation at any time.*

**Advisory Council Response:** Under the regulations, the Council has fifteen (15) days (after it receives the request for participation) in which to advise the FHWA and all consulting parties as to whether it will, or will not, participate in the consultation attempting to resolve the adverse effect. [Should it elect to get involved, the Council will, prior to entering the discussions, have provided a written notice to the FHWA, and the consulting parties, that its participation meets the criteria set forth in Appendix A of the regulations. The Council must also advise the Federal Highway Administrator that it has decided to enter the process.]

*NOTE: The above notifications are to be carried out by the Council and do not require any action on the part of the Iowa parties to these procedures. The primary responsibility of the DOT and FHWA is to do the best possible job of providing the various items of 'documentation' required by Section 800.11(e). The documentation needs to be as complete as possible so that the Council has the best possible information available to it on the basis of which to make a decision concerning its involvement in the consultation. The documentation also provides the basis on which the Council will make its future recommendations to the FHWA regarding resolution of the conflict.*

*When consultation is undertaken to resolve adverse effects to a significant historic resource with Council participation, the process must be conducted in accordance with Section 800.6(b)(2). Refer to that section of the regulations for details. If the Council does not join the consultation, the consulting parties proceed on their own, following the procedures of Section 800.6(b)(1), addressed in following sections of these procedures.*

**800.6(a)(2) and (3) Involving Other Consulting Parties:** The consulting parties and the Council (if participating), may agree to invite other individuals or organizations to also become consulting parties- if it is viewed that their involvement is appropriate by reason of their special interest or expertise, or by jurisdiction over the resource. Specifically, the FHWA must invite any person or organization that it is anticipated will assume a definite role or responsibility in any upcoming *Memorandum of Agreement* to participate as a consulting party. County or other local historical societies, or organized preservation groups, or other state or local governmental agencies that apply for federal funds are examples of parties the FHWA (and DOT) ‘**must** invite.’ County or local historical societies or preservation groups who do not have specific, defined responsibilities for the development of the project or protection of the resources are examples of ‘**should** invites.’ Also refer to the discussion for Section 800.2 on page 4 of these procedures.

The DOT will provide copies of the documentation required under 800.11(e), plus any other relevant information to any party invited (and accepting) to become an additional consulting party. **Note, however,** that this sharing of information is subject to the *confidentiality provisions* of Section 800.11(c).

**800.6(a)(4) Involve the Public:** The regulations again require the Agency Official (FHWA acting through DOT) to make information [about the adverse effect finding and attempts to resolve them] available to the public. The information to be ‘made available’ includes the material specified by 800.11(e): again, the information sharing process is subject to the confidentiality provisions of Section 800.11(c).

The DOT or FHWA will make information regarding a projects’ expected adverse effects to a resource, and the status of efforts to resolve those effects, available to the interested public for each project where such a situation exists. Making information “available” means that the agencies will follow procedures previously discussed in connection with implementing ‘public involvement’ requirements in Section 800.2(d) on pages 5 - 9 of these procedures. The reader is referred to this section for more detail on public involvement steps to be taken.

The approach is to publish sufficient public notices and/or other news accounts about a project, and its anticipated effects upon significant historic resources in the corridor, to make persons or organizations who may have an interest aware. It is also to let them know where they can go for access to the project and resource information. For DOT projects, they can contact the District Engineer or the Ames central offices, Office of Location and Environment. For city or county projects, they must turn to local sources, **such as** the city or county engineer.

The notices will explain that the public may express their views on measures being proposed, or yet to be identified, to eliminate or minimize the adverse effects. Valid new suggestions from knowledgeable persons will be given serious consideration by the DOT and FHWA during the consultation process.

A time limit of 15 days, from the last date of publication of the notice(s), will be established for return of comments from the public.

**Limitations on Public Involvement:** In deciding the extent to which they need to implement the above steps to involve the public in consultation aimed at reducing the adverse effects of a project on historic resources, the FHWA and DOT (or city or county engineer for local projects) will take into account the following factors:

- X the type and size of the project, and its anticipated APE;
- X the nature or severity of the adverse effect upon the resource(s);
- X the relationship of the federal involvement to the project; and
- X the extent of previous notice to the public about the project and historic preservation issues, the level of public interest generated by previous attempts, and any specific requests that may have been received as a result of those attempts made earlier in the Section 106 process for the project. The extent of effort to involve the public in consultation to reduce adverse effects must be sufficient to satisfy the standards set for public involvement in Section 800.2(d) of the regulations, which defines participants to the Section 106 process.

**800.6(a)(5) Restrictions on Disclosure of Information:** If an involved Indian tribe(s) has indicated to the FHWA or the DOT that the historic resource site (that is the subject of efforts to minimize or avoid adverse effects) is one of religious or cultural significance to them, and objects to the disclosure of information about the site to the general public, then the FHWA and the DOT will comply with Section 800.11(c) to limit the disclosure. Cities and counties developing projects for federal funding participation are bound by these same restrictions. Local officials will coordinate with the DOT when their projects involve significant historic properties to ensure that adequate confidentiality is maintained.

**800.6(b)(1) Resolution of Adverse Effects *Without* the Advisory Council:**

**(i) Look for Ways to Avoid** Initially, it will be the responsibility of the DOT to explore all possible ways to avoid or minimize adverse effects to significant historic resources. The DOT will consult with the FHWA and the SHPO in an attempt to identify feasible and prudent changes that may be possible for the project's location and/or design that would accomplish the goal. Within DOT, the OLE will confer with its district engineer(s), its offices of Design, Bridges and Structures, Right of Way, Construction, and any others as necessary in order to discover and evaluate all possible avoidance and minimization measures.

In some cases, it will be possible to avoid affecting the historic resource entirely; in others, it will be possible only to reduce the severity of the adverse effect. At times, nothing can be done if project location and/or design constraints are severe. In these cases where the impacts to the resource simply cannot be entirely avoided and the resource involves a historic structure or an archaeological site not limited to significance just for the information it contains, Section 4(f) of the U.S. DOT Act will apply and compliance with the requirements of Section 4(f) will guide and document these efforts to minimize and mitigate.

**(ii) Standard Treatments** The DOT and FHWA may make use of 'standard treatments' as established by the Council. The reader is referred to Section 800.14(d). The treatments

may be used to form a basis for a Memorandum of Agreement between the parties regarding mitigation of the adverse effect(s).

**(iii) Advisory Council Involvement** If the Council decides to get involved in the consultation regarding adverse effects at this point, then the FHWA and DOT will shift ahead to follow the steps prescribed in Section 800.6(b)(2).

**(iv) Memorandum of Agreement** If the FHWA/DOT, SHPO, and any consulting parties *do* reach agreement on how to resolve the problem of the project's adverse effects, then they execute a Memorandum of Agreement (MOA) among them. When all *consulting* parties, and any additional invited *concurring* parties have signed the MOA, the DOT provides the FHWA with a draft transmittal letter and the documentation required by Section 800.11(f). The FHWA transmits the MOA, with its attached information package, to the Council for its files **prior** to granting further project development or construction approvals to the DOT.

If the Council is not a signatory to the MOA, the MOA is effective upon its signing by the FHWA. Only the signatures of the consulting parties are required. Lack of signatures by concurring parties does **not** prevent execution of the MOA.

*NOTE 1: When the FHWA, the DOT and the SHPO reach agreement on how to resolve a project's adverse effects without Council involvement, and an MOA is prepared and executed only among the Iowa parties to these procedures, and pursuant to this section of the regulations, that MOA is still considered (by the regulations) to be the equivalent of an agreement with the Council, itself, even though it was not a signatory.*

*NOTE 2: When an MOA has been executed that stipulates measures to avoid, minimize and/or mitigate a project's adverse effects to a historic resource, the DOT and FHWA share responsibility for ensuring that the project is advanced and developed in a manner that is in full compliance with the stipulations of that MOA. The DOT initiates the steps to avoid, minimize or mitigate the effects while the FHWA consults, approves and oversees the process to ensure compliance with its regulations. Local governments who have signed an MOA for **their** projects also share the responsibility for ensuring compliance with Section 106, NEPA, Section 4(f) and any other applicable regulations.*

**(v) Failure to Agree:** If the FHWA/DOT and SHPO *fail* to agree on the terms of an MOA, then the FHWA must submit the documentation package specified in Section 800.11(g) to the Council and request the Council to join in the consultation process. *If* the Council decides to become involved, the parties will proceed as prescribed in Section 800.6(b)(2), (following). If the Council decides *not* to join the process, it will first notify the FHWA to that effect, and then proceed to offer its comments in accord with Section 800.7(c).

**800.6(b)(2) Resolution With Advisory Council Participation:** If the Council *does* decide to participate in the consultation to resolve the adverse effects, then the FHWA will proceed to consult with the SHPO, the Council and other 'consulting parties,' including Indian tribe(s) with an interest as recognized under Section 800.2(c)(3). The goal will be to seek ways to avoid, minimize and/or mitigate the adverse effect(s). *If* the parties, with the Council's involvement, do reach agreement on how the adverse effects will be resolved, they will prepare and sign a Memorandum of Agreement among them to document their decisions.

**800.6(c) Memorandum of Agreement:** An MOA, properly prepared, signed and carried out as prescribed by Section 800.6 of the regulations is considered to be of critical importance, a kind of ‘milestone’ document. It evidences that the FHWA has complied with the requirements of Section 106, and it also governs the further development and construction of the project for which it was prepared.

**General Notes on MOAs:**

The timely completion of Section 106 events is recognized by the designers of the DOT’s Can Do process as being critical to successful achievement of the goal of reducing overall project development time. The timing of each major phase of the Section 106 activities is specified in Can Do and will be tracked as events in the process of timely project development. The intent is to make sure that events- such as execution of an MOA, when required,- are carried out at the designated point in the process and within the allotted time frame so that eventual project construction letting is not delayed by the Section 106 process. For details of the time sequences of Section 106 activities, the reader is referred to the most recent report of the Can Do Process Implementation Team.

**MOA Procedures:** To develop the MOA to the satisfaction of all parties, the DOT and FHWA will consult with SHPO and other consulting parties to determine and establish verbal agreement on the best means of protecting the resource, prior to actually drafting the MOA. If they agree that protection/preservation is not feasible, then discussion shifts to the best means of documenting the resource (historic properties) or recovering the data it contains (prehistoric sites) for posterity. The appropriate mitigation measure(s) to be adopted will vary from project to project, and will vary depending upon whether the resource is an *archaeological site* (below ground; usually prehistoric but, may be historic), or a historic *property* (above ground; usually a bridge, building or other standing structure).

**For Archaeological Sites:** A qualified consultant (usually the same one who performed the Phase 2 Test for Site Significance) will be asked to prepare a detailed Data Recovery Plan for the site(s). The Data Recovery Plan must be reviewed by the SHPO and any comments incorporated into a revised design prior to actual recovery being initiated. The DOT uses the ‘standard treatment’ developed by the Council as its basis for MOAs for archaeological sites that are only valuable, and of significance, for the information they contain. The MOA for the project will include and refer to the Data Recovery Plan as the basis for mitigation measures being stipulated by the parties to resolve the adverse effect upon the resource.

**For Standing Historic/Architectural Properties:** The FHWA/DOT and SHPO have developed standard MOA language for the description of various measures designed to mitigate the adverse effects of projects upon different types of historic standing structural properties. With all of these properties, consideration is first given (when practicable) to preservation through moving to an alternative site without compromising historic features of the structure that make it historically significant. Assistance with moving costs can be offered as an incentive.

Whether moved or not, the historic structure must be ‘archivally documented’ to some level prior to its moving or demolition. The SHPO has written *Iowa Historic Properties Study Appendices*, which provide guidelines for effective documentation of the various types of standing historic properties.

Although ‘archival documentation’ (photos, site records, and historical narrative) is the more common mitigation measure, the SHPO will occasionally request that alternative measures be carried out. These have included published pamphlets or soft cover booklets based upon research and designed to present in lay language the story of the standing historic resource and its significance to the general public. The MOA for mitigation of adverse effects to Historic Properties will specify in some detail the measures that the parties have agreed to for a given project.

For all Historic Properties requiring an MOA, the Iowa parties review MOAs previously prepared for similar situations and strive to achieve consistency in wording and level of detail being employed in current agreements.

**800.6(c)(1) Signatories to the MOA:** Under the regulations, only signatories have the authority to execute, amend or terminate an MOA. An MOA *must* be signed to become valid. The question of who becomes a designated signatory depends upon how agreement was reached; i.e. was the Council involved, or not. In Iowa, the list of signatories *always* includes:

- X the FHWA and the DOT;
- X the SHPO (usually the Deputy SHPO); and
- X tribes *if* the affected resource is located *on* tribal land

If these parties could not reach agreement, and the Council became involved in the consultation, then the Council becomes an additional required signatory.

*NOTE: If none of the procedures already covered in Section 800.6, preceding, are successful in resolving the adverse effect(s), and the parties are forced to shift ahead to 800.7 procedures (“Failure to Resolve Adverse Effects”), then the signatories are limited to the Council and the FHWA.*

**800.6(c)(2) Invited Signatories to the MOA:** In addition to the ‘core group’ of signatories, there may be others, depending upon the location of the project and the nature of the affected resource, who may be invited by the FHWA to also become a signatory to the MOA. Foremost among these would be: **1)** any Indian tribe that has indicated it attaches religious and cultural significance to a resource located *off* tribal lands (may be invited); or **(2)** any party who would be assuming a responsibility under an MOA (should be invited).

*NOTE: The refusal of any of these invited parties to become signatories to an MOA does not invalidate the MOA, or prevent the project from going forward.*

**800.6(c)(3) Concurring Parties to the MOA:** The FHWA *may* invite all parties, not already mentioned in (a)(2) above, but involved in the consultation to resolve the adverse effect, to concur in the MOA. In addition, the signatories may elect to invite still others, as appropriate, to concur in the MOA. Again, the refusal of any of these invited concurring parties to concur does not invalidate the MOA or prevent the project from going forward.

**800.6(c)(4) Reports on MOA Implementation:** Where the signatories agree that it would be useful and appropriate, the MOA may include a clause that provides for monitoring of the mitigation activity and reporting on its results. In Iowa, any MOA prepared for the mitigation of adverse effects to an archaeological site will normally include a provision that

the SHPO's archaeological staff representative(s) will visit a data recovery site at least once while it is in progress. At the visit, the SHPO representative will see a summary of the field work methodology and results, and have an opportunity to interview the consultant performing the work. The SHPO will be looking for evidence that the provisions of both the Data Recovery Plan and the MOA have been (or are being) fulfilled.

In some cases, it may be necessary for the DOT to request that the SHPO representative visit the recovery site when work is essentially completed, but the excavations have not yet been backfilled. If project development schedules are extremely tight, it will be advantageous to the DOT and FHWA if the SHPO is able to conduct such a post-recovery visit and can approve the field work phase of the recovery. This will allow the project to proceed to construction prior to completion of the final data recovery report.

**800.6(c)(5) Duration of the MOA:** An MOA must, under the regulations, contain a provision that allows the MOA to be terminated or reconsidered if the project for which it was prepared has not been implemented within a specified period of time after execution of the MOA. The Iowa MOAs normally provide a period of up to five years after signatures for the stipulated measures to be completed. On a case-by-case basis, some MOAs may require completion in less time, such as three years.

**800.6(c)(6) Late Discoveries:** When the signatories to an MOA agree that it is appropriate, the agreement will include one or more provisions that spell out specifically how late discoveries (additional resources or effects revealed only after the mitigation work has been initiated and requiring additional consideration by the parties) will be handled. The DOT has made it a policy of the agency and a provision of its consultant contracts that all consultants performing historic resources work for it stop work and notify the OLE immediately in the event such late discoveries are made.

Additionally, if the late discovery is determined or suspected of being a prehistoric burial feature, a notification process is initiated among the DOT, the Iowa Office of the State Archaeologist (OSA), the DOT's Indian Ancestral Preservation liaison, and tribal consulting parties. These parties, in addition to FHWA and the SHPO, will confer (usually at the site) and determine the appropriate course of action with regard to the new information. The data recovery work is suspended, or moved to a different area until the decisions regarding the new information have been made, appropriate actions taken, and the consultant has been instructed by DOT to resume work at the late discovery site.

**800.6(c)(7) Amendments to the MOA:** The signatories to the MOA may agree to amend it as necessary.

*NOTE: If the Council was not a party to the original MOA and the signatories do execute an amended agreement, then the FHWA must submit a copy of the amended agreement to the Council.*

**800.6(c)(8) Termination of the MOA:** If it should happen that one or more of the signatories determines that the terms of an MOA cannot be, or could be but are not being, carried out as written, then the signatories will consult to look for suitable amendments that can be successfully implemented. If that can be done, then an amended MOA will be executed as provided for in 800.6(c)(7), above. However, if no agreement on suitable amendment(s) can be reached, then any of the signatories may terminate the MOA. In that event, the

FHWA will notify the Council and request its comments and participation under the provisions of Section 800.7(a), following.

- 800.6(c)(9) Copies of the MOA:** The DOT, will provide copies of an executed MOA to all ‘core group’ and invited consulting parties/signatories. In addition, the DOT and FHWA will include a copy of the MOA in the applicable environmental document(s) as prepared for the project to which the MOA pertains. Internally, the OLE will provide copies of the MOA to the DOT’s offices of [Road] Design, Right of Way and others as needed along with explanatory information, when necessary, to ensure that the provisions of the MOA are properly incorporated into road design plans and specifications, and into Right of Way actions and documents.

## **800.7 Failure To Resolve Adverse Effects**

**Procedures to Be Followed:** The Iowa parties to these procedures, and the authors of the regulations all recognize that there might be situations for which agreement cannot be reached, and an MOA cannot, therefore, be executed. The regulations provide that, if either the FHWA, the SHPO, or the Council reach the conclusion that agreement is not being reached, and that further consultation in an attempt to resolve the adverse effects will not be meaningful or productive, any of those may decide to terminate the consultation process. If any of these parties do make that decision, they must so inform the other two in writing and provide the reasons for their action.

The regulations provide a detailed set of steps to be followed in this event that involve the SHPO, the FHWA and the Council. The steps vary slightly depending upon which of the three has terminated the consultation process. Regardless, the steps all lead to the Council giving its comments to the FHWA, the FHWA considering those comments, and then making its final decision about how, or if, the undertaking (project) is to proceed. It is important to note that the final decision about any federal aid project rests with the FHWA, as the ‘lead federal agency,’ or ‘Agency Official.’ The involvement of both the SHPO and the Council is *advisory in nature only*.

The parties to these Iowa Section 106 Procedures will follow the steps outlined in 800.7 whenever an impasse is reached in the consultation process to resolve adverse effects. The reader is referred to the regulations for details about the steps.

- 800.8 Coordination of the Section 106 Process with the National Environmental Policy Act:** The DOT does not formally integrate Section 106 and the National Environmental Policy Act (NEPA). The processes run concurrently and the public hearings are integrated. The results of the Section 106 process are summarized in the NEPA document.

## **800.9 Advisory Council Review Of Section 106 Compliance**

- 800.9(a) Assessment of Agency Official [FHWA] Compliance for Individual Undertakings :** If any individual, agency or organization is dissatisfied with decisions reached, or processes followed, by the DOT and FHWA with regard to a particular project having Section 106

involvement, that person or organization may contact the Council and request that it review and comment upon the adequacy of the parties' compliance with the Section 106 process. Or, the Council may undertake to offer those comments on its own initiative. Either way, the comments are *advisory* with respect to the project. If the comments are received by the FHWA prior to any decisions having been made with respect to the project or Section 106 matter in question, then the FHWA must *consider* the Council's views before making its decisions about how the particular project is to proceed, with respect to the Section 106 involvement.

**800.9(b) Agency [FHWA] Foreclosure of Advisory Council's Opportunity to Comment** The regulations recognize (in this section) that, if the DOT and FHWA should fail to complete the requirements of Section 106 for a particular project *prior to* approving that project for construction, that may mean that the Council's opportunity to comment on the Section 106 aspects of the project has been foreclosed. The Council has the right to review any project situation where it believes its opportunity to comment has been foreclosed. To initiate such a review, the Council must notify the FHWA (Iowa), and the FHWA's Washington Office Historic Preservation Officer, and allow those parties 30 days to respond and provide information that would answer the foreclosure question.

If it receives information in response to its inquiry that leads the Council to conclude that such a 'foreclosure' *has* occurred, it must then submit a written copy of its determination to the Federal Highway Administrator. The Council *must*, under its own regulations, also make the foreclosure determination available to the public, and to any specific parties known to be interested in the project and its Section 106 involvement.

**800.9(c) Intentional Adverse Effect by Applicants [DOT]:** The FHWA is prohibited by Section 110(k) of the National Historic Preservation Act from approving any DOT project to be constructed with federal funding participation if it knows that the DOT, with the intent to avoid the requirements of Section 106, has intentionally significantly and adversely affected a Historic Property located within the project's corridor, or did not prevent the adverse effect from happening when it had the legal power to do so. The only exception to this rule is that the FHWA may approve such a project *if* it has first consulted with the Council on the matter and then determined that the particular project circumstances justify the approval even though the adverse effect has occurred. In this event, the FHWA must consider the Council's opinion in the matter, and must notify the Council, the SHPO and any other parties known to be interested in the project before approving the project.

Section 800.9(c) of the regulations contains several specific steps the FHWA must take to approve such a project when Section 110(k) applies. In the event the Iowa agencies should be faced with this specific situation, they would follow the steps outlined in this section of the regulations to ensure that their compliance with Section 106 is not jeopardized. The reader is referred to Section 800.9(c) of the regulations for additional information about the required steps.

**800.9(d) Evaluation of Section 106 Operations by the FHWA:** Section 203 of the National Historic Preservation Act (Act) allows the Council to obtain information from federal agencies, including the FHWA, and evaluate it to determine how well they are meeting their Section 106 responsibilities with regard to administration of daily project work. Based upon the information received, and its subsequent evaluation of the data, the Council may make recommendations to the FHWA for actions it believes need to be taken to

improve the efficiency and effectiveness of the process being used by the agencies. Should such a 'performance review' be undertaken in Iowa, the DOT and FHWA would endeavor to cooperate fully with the Council by providing the requested information, and by responding positively to any suggestions received from the Council for improving its Section 106 processes.

## **800.10 Protecting National Historic Landmarks**

- 800.10(a) Statutory Requirements:** A Historic Property that is designated and listed as a National Historic Landmark (NHL) is highly significant and commands the highest level of preservation and protection. An NHL is afforded maximum protection under the law (Act). The Section 106 regulations require the DOT and FHWA to make the maximum effort possible to protect historic properties as they go about the planning and design of highway projects. Direct, adverse effects to an NHL are to be avoided by the agencies' projects. When the Council comments on a project that stands to cause an adverse effect to an NHL, it will follow the process set out in Section 800.6 - 800.7, and give special consideration to protecting an NHL.
- 800.10(b) Resolution of Adverse Effects:** The FHWA is required to contact the Council and request its participation *any time* consultation is being initiated as described in Section 800.6 to resolve adverse effects to an NHL.
- 800.10(c) Involvement of the Secretary of the U.S. Department of the Interior:** The FHWA will notify the Secretary, U.S. Department of the Interior, Acting through the Director, National Park Service (Secretary) of any Section 106 consultation being initiated to resolve adverse effects to an NHL, and invite the Secretary to participate in the consultation. The Council may request a report from the Secretary if it believes the report would assist in the consultation process.
- 800.10(d) Report of Consultation Outcome:** Whenever the Council gets involved in consultation under this section of the procedures, it must report the outcome of the Section 106 process by providing a written report, or copy of any MOA to which it becomes a signatory, both to the Secretary and to the Federal Highway Administrator, Washington, D.C.

These actions are the responsibility of the Council in these NHL matters, and do not require any specific action by the Iowa agencies, *unless* the Council should request additional project data or other information from the agencies in order to complete its required report to the Secretary.

## **800.11 Documentation Standards**

- 800.11(a) Adequacy of Documentation:** Under the 'partnership' arrangement between the FHWA and the DOT for completing the Section 106 process in Iowa, and the formal letter of notification to the SHPO of March 1, 2001, the DOT normally prepares the various items of documentation for each project processed, and the FHWA reviews it for adequacy. As a practical matter, the FHWA does not so review each and every piece of correspondence and report generated between the DOT and its consultants, or the DOT and SHPO. However, under the regulations, the FHWA does have the responsibility to check and ensure that written 'determinations,' 'findings' or 'agreements' prepared by the DOT or its

consultants for Section 106 are supported by sufficient documentation to enable any other reviewing party to understand their basis.

This requirement is flexible with regard to Historic Property identifications or significance evaluations being conducted on a 'phased' basis. That is, the level of detail expected in a Phase 1 report is, by definition (See pages 14 - 15), less than that expected for a Phase 2 report; a Phase 2 is less than for a Phase 3 report.

If the Council (or the SHPO, if the Council is not involved), upon review of project documentation, determines that it does *not* meet the standards of this section, then the Council (or SHPO) will notify the FHWA of the deficiency and proceed to specify what information needs to be added or revised in order to be acceptable. The FHWA, or any involved consulting party, has the option of asking the Council to review any disputes that may arise over the adequacy of documentation that has been prepared. The Council will then review the dispute and offer its views on the situation to the FHWA and/or to the involved consulting parties.

**800.11(b) Format of Section 106 Documentation:** The FHWA and the DOT have the option of using documentation that has been prepared to comply with other laws (such as the NEPA or Section 4(f) of the DOT Act) to fulfill their responsibilities under Section 106. However, the substituted documentation must meet the standards of this section for format and content.

**800.11(c) Confidentiality of Historic Property Information:** On occasion, a Historic Property that has been identified by the DOT in connection with Section 106 activities may turn out to be of religious or other cultural significance to one or more Indian tribes or other interested parties. Prehistoric mortuary sites containing burial mounds or other features are of primary concern. Section 263B.10 of the Code of Iowa requires that information about these sites, or other archaeological sites that may be at risk as a result of public exposure, be treated as confidential to prevent their being excavated by amateur collectors or other unauthorized persons. Section 304 of the National Historic Preservation Act also recognizes this potential and provides a remedy for the FHWA and the DOT.

Under 304, the FHWA may withhold information about such sites when it determines that release would jeopardize the sanctity and significance of the property. Specifically, 304 states: "... after consultation with the Secretary, [the FHWA] shall withhold from public disclosure information about the location, character, or ownership of a Historic Property when [it believes such] disclosure may result in a significant invasion of privacy; risk physical harm to the property; or impede the use of a traditional religious site by practitioners. When this occurs, the Secretary is obliged to consult with the FHWA as needed and then determine who shall have access to the information for the purpose of continuing the Section 106 processing.

In doing so, the Secretary shall, in turn, consult with the Council in reaching the determinations needed regarding withholding of data and deciding whom may have access to the data. If requested, the FHWA may need to provide information to the Council concerning the views of the SHPO, as well as any affected tribes, about the confidentiality issues. The Council has 30 days, beginning *only after* its receipt of adequate documentation, to comment to the FHWA and the Secretary.

**DOT Confidentiality Procedures** Data developed by consultants and presented to the DOT about historic properties located within proposed highway corridors that are thought to meet the criteria above for sensitive information are always to be regarded as confidential. The data are to be shared *only* with those persons in governmental agencies concerned with the project and having a need to know about the sites. The incorporation of such data into NEPA environmental documents, planning reports, public hearing or information meeting displays and other mediums will not be allowed.

- 800.11(d) Documentation of a Finding of ‘No Historic Properties Affected’:** When the DOT has followed the Section 106 process to Section 800.4(d) and determined that the project will result in a finding of “no [significant] historic properties affected,” it must provide documentation to the SHPO and other designated consulting parties and also make it available for public inspection. The documentation must substantiate the ‘No Historic Properties Affected’ finding and include the information given in items (1) - (3), below.

*NOTE: The previously stated rules regarding protecting the confidentiality of the historic site information will be applied to this disclosure with respect to sharing data with the public.*

- 800.11(d)(1) Project Description:** Define the physical limits of the project, the APE that has been agreed upon, and the nature of the federal involvement. Include, as necessary, maps, plan sheets, photos or aerial photos, or other materials to adequately describe the location, concept and extent of the proposed project.

*NOTE: The Programmatic Memorandum of Understanding (PMOU) to which these procedures are attached may contain “standard” definitions of APE for specific project types. If the APE for a given project varies from the standard for whatever reason, the SHPO may comment upon the adequacy of that APE. Information from which to determine if the standard APE applies can best be located in the project’s concept statement, the project description of the applicable NEPA document, or the introductory sections of the Historic Properties survey report.*

- 800.11(d)(2) Steps Taken to Identify Historic Properties:** It is essential that the SHPO, other consulting parties, and any public reviewers of documentation developed in support of a finding of ‘No Historic Properties Affected’ be presented with a complete description of steps taken by the DOT to identify historic properties that a proposed project could affect. A presentation of the results of the surveys conducted to satisfy Section 800.4(b) of the regulations will usually be satisfactory.

- 800.11(d)(3) Basis for Finding of ‘No Historic Properties Affected’:** The 800.4(b) survey results and project location and/or design information provide the basis. If there is any question, the SHPO will be consulted at the time the determination is being made. Special care needs to be exercised in those situations where significant properties are present in the general area of a project, but are thought to be far enough away (well outside the APE) that they will not be affected. The SHPO’s comment will be solicited any time there is a question before the determination is finally made.

*NOTE: (d)(1) through (d)(3), above, is the same information that is regularly sent from DOT to SHPO to document a finding [by DOT] for a specific project that ‘no historic properties are affected’. It normally consists of: 1) a cover letter stating the DOT’s*

*conclusions; 2) the Historic Properties survey report; and 3) a completed project summary form. For Transportation Enhancement projects, the package includes the Findings and Recommendations Form as developed for this purpose by the SHPO.*

- 800.11(e)** **Documentation of Finding of ‘No Adverse Effect’, or ‘Adverse Effect’:** For these findings, the documentation package will be provided to the SHPO and other designated consulting parties. The documentation will include:
- 800.11(e)(1) Project Description:** A complete description of the overall project specifying the nature of the federal involvement, the physical features of the project, the Area of Potential Effect (APE), and photographs, maps and drawings as needed to adequately define the project and its expected area of impact to Historic Properties. Again, a copy of any Historic Properties survey report or NEPA documentation already prepared, or excerpts from these reports, can be used to provide the necessary descriptions.
- 800.11(e)(2) Steps Taken to Identify Historic Properties:** A description of steps taken to identify historic properties likely to be affected by the project as required by Section 800.4(b) of the regulations.
- 800.11(e)(3) Description of Historic Properties Affected:** This property description must include complete information on the aspects or characteristics of each property that makes it eligible for the *National Register*. Again, a copy of the Historic Properties survey report, or suitable excerpts from the report can be used to provide this information.
- 800.11(e)(4) Description of Project Effects on Historic Properties:** A description of the nature and extent of the project’s effects on each Historic Property. Here, maps or aerial photographs should be used to graphically show the relationship between a property and the proposed project.
- 800.11(e)(5) Application of Criteria of Adverse Effect:** A discussion of how the ‘Criteria of Adverse Effect’ were applied to each affected property and how the conclusion was reached for each that the criteria were applicable or inapplicable. This discussion should also include information on any steps the agencies have identified pertaining to project location and/or design that would result in either complete avoidance, or at least minimization, of any adverse effects. There should also be a description of any measures that will be taken to mitigate those adverse effects that cannot be avoided through changes to project location and/or design.
- 800.11(e)(6) Input from Others Parties:** The documentation package in support of a finding of ‘adverse effect’ or ‘no adverse effect’ should include a copy or summary of comments received from other consulting parties, reviewing agencies or organizations, and the public that pertain to the adverse or no adverse effect finding for each property affected by the project.
- 800.11(f) Documentation for a Memorandum of Agreement:** By the time an MOA is filed with the Council, documentation for the earlier steps (properties, effects, etc.) will already have been prepared and provide good background support information for the Council’s reference as it looks at a proposed MOA. However, the DOT and FHWA will need to look at what they submitted for 800.6(a)(1), (getting the Council involved in resolution of adverse effects) for completeness and include, with the MOA submittal, information

describing any substantive revisions or additions to the project, affected properties, and any measures proposed to avoid or minimize, plus proposed mitigation.

If any NEPA documents (FONSI, Section 4(f) Statements, FEISs, RODs, etc.) have been completed, a copy of those should be included with the supplemental documentation. The documentation should also include copies of any input received from other 'Consulting Parties,' agencies, organizations, or the public pertaining to the adverse effects, avoidance, mitigation, etc. since the earlier documentation submittals to the Council.

**NOTE REGARDING DOCUMENTATION:** *The DOT has relied extensively upon the use of NEPA documents and excerpted sections, or full copies, of its Historic Properties project completion reports to provide project and affected resources descriptive data in its submittals to the Council. NEPA documents are prepared in compliance with CEQ and FHWA guidelines and requirements, and so follow the standards established for format and content. Complete descriptions of the projects, their purpose and need, their APE's and historic resources that may be affected are a normal part of these documents. The Historic Properties survey Project Completion Reports (PCRs) are prepared exclusively by consultants for the DOT, and so, some variety in format and content is found. However, the SHPO has published guidelines that define what it expects for format and content in Historic Properties survey PCRs; the DOT requires its consultants to adhere to these guidelines.*

*Additionally, the DOT has developed supplemental guidelines for its consultants that describe in greater detail what is expected for format and content in PCRs. Project descriptions, survey area boundaries, maps and graphics, and summary tables are among the items addressed in the guide. A copy is appended to these procedures as **Exhibit "C"** for reader reference. All of these format and content requirements are imposed in the interest of facilitating a more expeditious review of reports by DOT staff and the SHPO at the heart of the Review & Compliance Process (R&C). Consistency in format and content, including detail and quality of graphics, is considered essential to efficient processing of reports. The agencies believe that this approach to report preparation makes them entirely suitable (usually) for submittal to the Council as essential elements of documentation packages required by Section 800.11 of the regulations.*

## **800.12 Emergency Situations**

Section 800.12 of the regulations encourages agencies such as the FHWA and DOT to develop, in consultation with their SHPO and any affected Indian tribe(s), procedures for taking historic properties into account when they must take quick action in response to a natural disaster that threatens life or property, or an emergency declared by the President, the IA Governor, or a tribal government. If such procedures are developed, and approved by the Council, they will govern the agencies' handling of their historic preservation responsibilities during any disaster or emergency *in lieu of* compliance with Sections 800.3 through 800.6 of the regulations. The regulations provide that if an emergency or disaster occurs, and the agencies do *not* have procedures approved by the Council in place, then they have two choices. They may either:

- 800.12(b)(1)** follow special procedures that have been set up in advance for this purpose by means of a Programmatic Agreement between them that contains specific provisions outlined by Section 800.14(b) of the Regulations for dealing with historic properties in emergency situations; **or**

**800.12(b)(2)** notify the Council, the SHPO and any Iowa Indian tribe that may attach religious and cultural significance to historic properties likely to be affected *prior* to proceeding with the emergency work, and affording them an opportunity to comment within seven (7) days of notification.

*NOTE: If the FHWA determines that circumstances of the emergency do not permit them to wait the full seven days for return of comment, it will still notify these same parties, explain the urgency of the situation, and invite them to respond by the quickest available means within whatever time frame it believes is available.*

*The Iowa parties have used a modified version of these procedures. Here, the DOT will notify the FHWA and the SHPO of the emergency and determine, in consultation with those agencies, the most appropriate course of action that will remedy the emergency situation and still take historic preservation into account. If an archaeologist and/or architectural historian is requested to survey the area(s) involved in the emergency, that survey must be conducted immediately, or as soon as weather or other conditions permit. A verbal report is requested and is then reviewed with the SHPO. If the SHPO gives verbal approval, the work may proceed but the written report must follow within 30 days. FHWA will take into account the verbal report as requested and reviewed in reaching a decision on how to proceed with the emergency undertaking.*

### **800.13 Post-Section 106 Review Discoveries**

**800.13(a) Planning for Post-Section 106 Discoveries:** Regardless of the level of effort and expertise expended to identify historic properties and coordinate results with SHPO, tribes, and the interested public in a timely manner (well in advance of a project's actual construction), there always remains the possibility that resources will be unexpectedly discovered during construction. The DOT and FHWA have long recognized this fact and have devised various strategies over the last nearly 30 years to deal with this situation.

There is particular concern when human remains are unexpectedly unearthed during construction and examination reveals that they are greater than 150 years in age. The DOT has made it a policy and a standing commitment to the state's Indian representatives to make every effort to protect and preserve these resources during highway construction and maintenance activities.

#### **DOT Burial Encounter Procedures**

The Office of the State Archaeologist (OSA) has statutory authority over all burials, both prehistoric and historic, of more than 150 years in age. By informal agreement with the OSA and the designated Indian tribal representative, the following steps are to be taken any time human remains are unearthed, or other artifacts associated with mortuary features are found during project construction or maintenance activities in Iowa:

1) The contractor will immediately cease excavation work in the area of the discovery and secure the site from any further possible disturbance; then,

2) the contractor will notify the DOT's construction site representative who shall immediately notify the DOT's designated representative. The designated representative will, in turn, immediately contact the DOT's tribal ancestral preservation representative, the OSA Burials Program Director, and the Director, Office of Location and Environment, DOT, then

- 3) The Office of Location and Environment, DOT will notify the FHWA, the SHPO, and tribal consulting parties; and
- 4) the parties will confer (at the site, if deemed necessary by any of the three) to identify the discovery, determine the likely project impacts if left in place, and the most appropriate avoidance, minimization, or mitigative measure(s) for dealing with the discovery. Wherever possible, the DOT will attempt to have a qualified archaeologist visit the discovery area the same day or the next working day to assist with identification and determination of appropriate procedural steps; then
- 5) although the SHPO does not have responsibility or authority under Iowa law to make decisions regarding disposition of mortuary discoveries, it will be consulted and its comments considered within the purview of its responsibilities under Section 106; then
- 6) when arrangements have been made to deal with the discovery that are acceptable to all concerned and relocation of artifacts or other steps agreed upon have been completed, the Office of Location and Environment (OLE) will advise its construction site representative that work may be resumed. OLE will convey to the construction staff any special precautions or limitations to be placed on the contractors activities as a result of the discovery.

#### **Additional Information Concerning Discoveries in Iowa**

1) All construction contractors performing work for the DOT are bound by the provisions of the DOT's publication entitled "*Standard Specifications for Highway and Bridge Construction, Series 1997*". **Specification 2102.10, "Archaeological Salvage"** which states in its entirety as follows:

"Whenever the Contractor's operations encounter remains of prehistoric people's dwelling sites, burial sites, or artifacts of historical or archaeological significance, the operations shall be temporarily discontinued at the site. The [DOT] Engineer, in conjunction with proper archaeological authorities of the State of Iowa, will promptly examine the exposure and determine the disposition.

When directed by the Engineer, the Contractor shall excavate the site in a manner to preserve the artifacts encountered and remove them for delivery to the custody of the proper State authorities".

- 2) When design plans are finalized for a project where the potential for occurrence of subsurface prehistoric deposits is considered high- even though no surface evidence was observed during survey by qualified archaeologists- a note will be placed at one or more locations within the plan set alerting the contractor to the possibility that historic resources may be exposed, urging caution, and directing his attention to Specification 2102.10.
- 3) Contracts of the DOT with historic resource consulting firms or institutions for all phases of Historic Properties survey, testing or data recovery contain language requiring the consultant to immediately suspend work at the site and notify the OLE in the event bone known or suspected of being human is unexpectedly unearthed. The three-way notification process described above will be followed.

4) The DOT's staff in the OLE is available to assist local city and county engineers with these procedures when discoveries are made on their construction projects. The DOT's District Offices provide the interface and coordination with the local officials and will transmit the decisions of FHWA, SHPO, OSA, and the tribal representative(s) regarding disposition of their discoveries.

**800.13(b) Discoveries Without Prior Planning:** The regulations now provide that, if historic properties, or effects to historic properties are identified *after* the Section 106 Process has been completed, but a formal process for dealing with these discoveries as suggested by 800.13(a) has *not* been established, the DOT and FHWA should make reasonable efforts to avoid, minimize or mitigate adverse effects to those properties. The agencies acknowledge this requirement and are agreed that the Iowa notification and conflict resolution process outlined for Section 800.13(a), above, has satisfactorily responded to the concept of this provision of the regulations in the past. With the addition of notification to any *other* interested tribe (along with the designated Iowa tribal representative), and the inclusion of FHWA's assessment of the *National Register* eligibility of the late discovery in the notification, these procedures are still valid.

### Subpart C — Program Alternatives

#### 800.14 Federal Agency Program Alternatives

**800.14(a) Alternate Procedures:** The regulations provide that the DOT and FHWA *may* [if desired], develop their own set of procedures with which to implement Section 106 requirements. They may substitute same for all or just a part of Subpart B of the regulations (800.3 through 800.13, the entire process as applied to federally assisted undertakings) *if* they are consistent with the Council's own procedures and regulations. (See Section 110(a)(2)(E) of the *National Historic Preservation Act*.) At the time of the writing of *these* procedures, the SHPO, the DOT and FHWA do not anticipate that development of such 'Program Alternatives' would be of benefit to the Iowa agencies involved with historic preservation activities, and they have not contemplated developing any in addition to the 1998 Programmatic Memorandum of Understanding already in effect between them (see 800.14(c), following).

**800.14(b) Programmatic Agreements:** The January 2001 version of the regulations contains a new provision (denoted as 800.14(b)(4) that authorizes the *Council* to create what is referred to as "prototype programmatic agreements" that can provide a model for other subsequent PA's to be prepared and executed between a federal agency (FHWA) and a SHPO for the same type of program, or for a repetitious 'program type' [class of undertakings] *without* Council participation. This approach may offer a more expeditious way to develop and implement PA's.

The Iowa agencies have agreed, informally, that they do not wish to adopt a full program *alternative* to the *standard* Section 106 process. Rather, they will simply plan to continue following the standard process prescribed by Part 800, and prepare fairly detailed written procedures to document how they will follow the Part 800 process from start to finish. Those written procedures are the subject of this document, and they are prepared as much for the benefit of other, outside agencies (such as the U.S. Army Corps of Engineers) with whom the DOT and FHWA interact frequently during project development as they are for

FHWA, DOT and SHPO, themselves. The intent is to document and attest to the commitment of the three-party Iowa group to follow the process to its required conclusion for all applicable projects.

Any Part 800 procedural PA developed by the Iowa agencies would be prepared and used in accordance with the provisions of Section 800.14(b) of the regulations. The reader is referred to that section for details.

**800.14(c) Exempted Categories of Programs or Projects:** The regulations provide that the FHWA may elect to establish a program or category of agency undertakings (projects) that may be exempted from the normal Section 106 review process. Although a significant time saving approach, such an exemption program may only be used if:

(i) the actions within the program or category (categories) would otherwise qualify as “undertakings” as defined in Section 800.16 of the regulations; and

(ii) the potential effects of the program or category (categories) upon historic properties are known or predictable, and likely to be minimal or not adverse; and]

(iii) exemption of the program or category (categories) is not inconsistent with the purposes and intent of the *National Historic Preservation Act*.

*Note on Iowa Programmatic Memorandum of Understanding: In September 1998, the FHWA, the SHPO, and the DOT executed a “Categorical No Historic Properties Affected Programmatic Memorandum of Understanding” (PMOU) among them that was designed to exempt (from normal Section 106 review) several categories of minor scale highway improvement actions and Transportation Enhancement Program projects. Although not a signatory to the PMOU, the Council did review and comment upon drafts of the agreement, and was in concurrence with its concept and provisions at the time it was executed. The Iowa agencies have found this agreement to be an effective means of reducing the time and paperwork demands of their historic preservation program while ensuring that resources are afforded an adequate level of consideration and protection. At the time of the writing of these procedures, the Iowa agencies expect to keep the agreement in force until circumstances surrounding the Council’s regulations or historic preservation needs in Iowa suggest that a change is desirable.*

**800.14(c)(2) Public Participation in Developing Exemptions:** If new agreements to exempt programs or projects from Section 106 review are advanced in Iowa in the future, their development will include public, and other affected parties, participation. The extent of such participation would be commensurate with the expected extent to which the public, agencies, or organizations would be affected by the exemption agreement. It is expected that the SHPO would play a leading role in the identification of other agencies or organizations that should be contacted for input. The DOT and FHWA would take the necessary steps to solicit comments from the interested public.

**800.14(c)(5) Advisory Council Review of Proposed Exemptions:** Future new agreements would, as in the past, require the review of the Council. Supporting documentation would include descriptions of the programs or undertaking categories for which the exemption is sought, a discussion of how the criteria of (c)(1), above, are met, and a discussion of how input from

other agencies, organizations, Indian tribes (if applicable) and the public was obtained. Any such input would be summarized and responded to as appropriate.

- 800.14(f) Consultation with Indian Tribes When Developing Section 106 Program Alternatives:** In the event that the DOT, SHPO, and FHWA should elect to supplement existing or develop additional exemption agreements for the Iowa historic preservation program, the agencies would ensure that the development process includes consultation with any Indian tribes identified as having an interest in programs and projects of the agencies in Iowa. The extent of the consultation would be commensurate with the expected level of interest of the tribe(s) and the degree to which they stand to be affected by the exemption agreement. (See Section 800.2(d) for additional discussion on level of involvement.)

This document presents the operating procedures that will be followed in Iowa by the FHWA, SHPO, and DOT in response to the ACHP revised Section 106 guidelines issued in January 2001. These procedures for the implementation of Section 106 requirements have been reviewed by all parties and agreed upon. Questions regarding the content of this document may be directed to:

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