

# Procedure for Implementing Section 106

## REGARDING

## FEDERAL TRANSPORTATION PROJECTS IN MISSISSIPPI

### Introduction

The Federal Highway Administration (FHWA), as the Official Agency and being legally responsible for all findings and determinations, has requested the Mississippi Transportation Commission, acting by and through the Mississippi Department of Transportation (MDOT), the primary recipient of Federal-Aid Highway funds in the State of Mississippi, to provide assistance to FHWA in complying with 36 CFR 800 of the National Historic Preservation Act (NHPA), as amended.

FHWA, the federal agency with statutory responsibilities for administering the Federal-Aid Highway Program, has developed this procedure for implementing Section 106 of the National Historic Preservation Act in full cooperation and with the assistance of the MDOT.

MDOT shall conduct the day-to-day activities with the State Historic Preservation Office [Mississippi Department of Archives & History] (MDAH) in coordination with the FHWA and

1. In recognition of the government-to-government relationship between the United States and the Mississippi Band of Choctaw Indians, the Choctaw Nation of Oklahoma, the Jena Band of Choctaw Indians, the Chickasaw Nation, the Tunica-Biloxi Tribe, the Alabama-Coushatta Tribe of Texas, the Muscogee (Creek) Nation, and the Quapaw Tribe of Oklahoma, consultation shall be initiated by FHWA.
2. In the event of a dispute, regardless of the nature (designation of Area of Potential Effect, suitability of consulting parties, eligibility, or effect determinations) FHWA shall be involved in the resolution in accordance with 36 CFR Part 800.
3. FHWA is responsible for the submittal of Memoranda of Agreement (MOA), Memoranda of Understanding (MOU) (as appropriate), and dispute resolution of eligibility and adverse effect determinations.

This procedure, as presented by FHWA, is not intended to create new regulatory or replace existing legal requirements. If at any time a signatory to this process determines that the intent of the Section 106 consultation process, as described in 36 CFR Part 800, is not being satisfied, FHWA shall, in writing, notify the other parties to this agreement of their concerns. A conference between the parties to resolve these concerns shall be conducted at the earliest opportunity.

FHWA and MDOT intend to conduct undertakings in a manner consistent with 36 CFR 800 and to integrate historic and archaeological preservation planning and management decisions with other policy and program requirements in a manner consistent with Section 106 of the NHPA, as amended, and other federal and state authorities.

FHWA and MDOT are committed to avoid, minimize and/or mitigate adverse effects on historic properties, including burials, and to recognize that preservation and protection of these resources are respectful to the past indigenous Indian people who inhabited what is now the State of Mississippi, and is vital to the state's history.

FHWA, MDOT, MDAH, and the Mississippi Band of Choctaw Indians, the Choctaw Nation of Oklahoma, the Jena Band of Choctaw Indians, the Chickasaw Nation, the Tunica-Biloxi Tribe, the Alabama-Coushatta Tribe of Texas, the Muscogee (Creek) Nation, and the Quapaw Tribe of Oklahoma hereby agree that this process pursuant to Section 106 of the NHPA, as amended, and other applicable authorities for Federal-Aid projects and shall conduct meaningful consultation through following stipulations:

**Initiate the Consultation (36 CFR 800.3)**

- A. Establish that the activity is a Federal Undertaking
  1. An undertaking is defined as all projects that receive federal funds or require some form of federal permit or approval and have the potential to affect historic properties. Most federally funded highway projects are "undertakings" which require the Section 106 process be completed.
  2. Section 106 does not apply to state-funded projects, unless a Federal permit or approval is required. In that situation, the Federal agency that is responsible

for issuing the permit or approval will be the lead Federal agency for purposes of Section 106. For example, if the project was state-funded but required a Section 404 permit then the Corps of Engineers would be the lead Federal agency for Section 106 purposes.

B. Establish potential to impact historic properties

1. Sufficient information shall be gathered to support a recommendation by MDOT and decision by FHWA as to whether the project has the potential to cause effects/impact historic properties.
2. FHWA shall decide whether the project has no potential to cause effects or if the undertaking might affect historic properties.

C. Identify Consulting Parties

1. Early in the project development process, the MDOT in coordination with FHWA shall advise the MDAH that the Section 106 process has formally begun and request their input concerning consulting parties, Area of Potential Effect (APE), and public involvement efforts.
2. Invitations to Consulting Parties
  - i. There are two types of consulting parties. First is by-right consulting parties. The second is by-invitation consulting parties.
  - ii. By-right consulting are legally entitled to participate as consulting parties and include:
    - MDAH
    - Federally-Recognized Tribes
    - FHWA
    - MDOT
    - Federal/State agencies (if the project is within their jurisdiction)
    - Local Governments (if the project is within their jurisdiction)
    - National Park Service (if the project is on the Parklands or involves a National Historic Landmark)
  - iii. By-invitation consulting parties may include:
    - Individual citizens
    - Local historic preservation organizations or interest groups
    - Federal/State agencies with an interest in the project

By-invitation consulting parties must petition FHWA in writing to formally request to become a consulting party. In consultation with the SHPO and other consulting parties, FHWA shall either approve or deny those requests. FHWA

will then be responsible for informing the consulting party that their request was approved or denied.

3. FHWA and MDOT will plan public involvement relative to the scope of the undertaking.

### **Identify & Evaluate Historic Properties (36 CFR 800.4)**

#### **A. Define the Area of Potential Effect**

1. The APE is defined as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effect is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” 36 CFR 800.16(d).
2. Throughout the early stages of the Section 106 process, the MDOT in corporation with FHWA shall coordinate with consulting parties in determining an APE.

#### **B. Identification and evaluation of Historic Properties in the APE**

1. FHWA is required to make a “reasonable and good faith effort” to identify historic properties in the APE.
  - i. Historic Property means any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places maintained by the Secretary of Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional and cultural importance to an Indian tribe that meet the National Register criteria. Historic properties may include structures, places, archaeological sites, and cemeteries.
  - ii. The reasonable and good faith efforts shall include:
    1. A review of existing information,
    2. Seeking the input of all consulting parties and the public.
2. Field investigations shall be conducted in accordance with the Secretary of the Interior’s *Standards and Guidelines for Archaeological Documentation* [36 CFR Part 68] and consistent with MDAH’s *Standards and Guidelines for Archaeological Investigations and Reports in Mississippi* (2001) and the

MDOT's *Guidelines for Contractors on Archaeological Investigations and Reports* [2007]).

### 3. Late Discoveries

- i. Appropriate steps shall be taken to minimize or mitigate any transportation impacts to the "find" with the provisions of 36 CFR 800.13. In case of a late archaeological discovery or evidence of prehistoric human remains, all project work in the vicinity of the discovery area shall cease immediately. The area shall be secured and protected. A full assessment of the "find" and the level of its cultural significance will be made.
- ii. Confidential information concerning the late discovery shall be handled according to 36 CFR 800.6 (a) (5).

### 4. Eligibility and Effect Determinations

- i. FHWA shall send appropriate eligibility and effect documentation (per 36 CFR 800.11) to appropriate consulting parties. This documentation must include a finding of no historic properties present or a finding of historic properties present. If historic properties are present, the documentation shall also include a finding that no historic properties are affected, no historic properties are adversely affected, or a finding that historic properties are adversely affected.
- ii. For project studies that recommend the site(s) is eligible and has an adverse effect for any alternative, a transmittal letter/email will be submitted to appropriate consulting parties with the following basic information:
  1. Resource name or identification.
  2. Location of site.
  3. Eligibility and effect recommendations for resource.
- iii. Depending on the size and complexity of the project, eligibility and effect determinations may not be able to be issued simultaneously. In cases where this occurs, FHWA will submit separate eligibility and effect documentation to the appropriate consulting parties.
- iv. All consulting parties shall have 45 days from the receipt of the notification to comment on the eligibility and effect determinations. If the consulting parties do not respond within 45 days, FHWA shall confirm receipt of the information before assuming concurrence. If any consulting party disagrees within the 45 day review period, FHWA must either consult with that party and resolve the disagreement or refer the matter to the Keeper of the National Register for resolution of eligibility determinations or the Advisory

Council on Historic Preservation (ACHP) when adverse effect resolution is warranted. The ACHP will have 15 days to make a determination.

- v. The Keeper of the National Register is responsible for making the eligibility determination to resolve a disagreement. The ACHP resolves disagreements involving adverse effects.
- vi. If a consulting party or parties do (does) not agree with FHWA's recommendation on the eligibility status of a property, FHWA shall send a request for eligibility determination to the Keeper of the National Register of Historic Places. The Keeper's determination is binding (36 CFR 63).

#### **Assessment of Adverse Effects (36 CFR 800.5)**

- A. Criteria of Adverse Effect (per 36 CFR 800.5(a)(1)). Definition: The project may alter, directly or indirectly, the characteristics that qualify the property for inclusion on the National Register, and/or the project may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling or association.
- B. All consulting parties shall have 45 days from the receipt of the notification to comment on the assessment of adverse effects. If the consulting parties do not respond within 45 days, FHWA shall confirm receipt of the information before assuming concurrence.
- C. In cases where the FHWA and consulting parties disagree on effect determinations, FHWA shall forward the matter to the ACHP. Once again, the ACHP shall have 15 days to make a determination. If the ACHP does not reply within 15 days, their concurrence with FHWA is assumed (36 CFR 800.5(c)(2)(ii) and 36 CFR 800.5(c)(3)(i)).
- D. Per Section 304 of the National Historic Preservation Act and Section 9(a) of the Archaeological Resources Protection Act, specific archaeological site locations shall not be included in documentation made available to the general public. This will minimize the potential for endangerment of sites from vandalism or theft.

#### **Resolution of Adverse Effects (36 CFR 800.6)**

- A. FHWA shall work with consulting parties to resolve any adverse effects on historic properties. Resolution will involve avoidance, minimization, and/or mitigation of adverse effects to historic properties.
- B. Measures to resolve the adverse effects shall be outlined in a Memorandum of Agreement (MOA), which concludes the Section 106 process:
  - 1. Shall be consistent with the format developed by FHWA and consulting parties;

2. Shall be drafted by FHWA and MDOT;
  3. Shall be as specific as possible in terms of avoidance, minimization, and mitigation measures;
  4. May be reviewed by the legal counsel of appropriate consulting parties if the MOA is unique or complex;
  5. Shall give all parties with implementation responsibilities the opportunity to be signatories. If those parties choose not to sign the MOA the process may proceed;
  6. The MOA must be signed by FHWA, MDAH or ACHP, MDOT, and other appropriate consulting parties;
  7. The stipulations of the MOA shall be fully executed prior to construction.
- C. FHWA shall submit a transmittal letter/email to the ACHP requesting a determination of interest in the resolution of adverse effects. This letter will have the following basic information:
1. Description of the undertaking.
  2. Steps taken to identify historic properties.
  3. Description of the undertaking's effect on historic properties.
  4. Discussion on the criteria of adverse effect and efforts to avoid, minimize, and mitigate adverse effects.
  5. Views or comments from consulting parties, the public, and the Mississippi SHPO (MDAH).
  6. Views or comments from affected Federally-Recognized Indian Tribes.

### **Implementation**

Accordingly, FHWA, MDOT, MDAH, and the Mississippi Band of Choctaw Indians, the Choctaw Nation of Oklahoma, the Jena Band of Choctaw Indians, the Chickasaw Nation, the Tunica-Biloxi Tribe, the Alabama-Coushatta Tribe of Texas, the Muscogee (Creek) Nation, and the Quapaw Tribe of Oklahoma, and have agreed to work cooperatively in good faith to fulfill their responsibilities of government-to-government consultation for the management, protection and/or mitigation of historic properties as required by applicable federal and state authorities.

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**FEDERAL TRANSPORTATION PROJECTS IN MISSISSIPPI**

**THE MISSISSIPPI DIVISION OF THE FEDERAL HIGHWAY ADMINISTRATION**  
**THE MISSISSIPPI TRANSPORTATION COMMISSION,**  
**THE MISSISSIPPI DEPARTMENT OF ARCHIVES & HISTORY,**  
**THE MISSISSIPPI BAND OF CHOCTAW INDIANS,**  
**THE CHOCTAW NATION OF OKLAHOMA,**  
**THE JENA BAND OF CHOCTAW INDIANS,**  
**THE CHICKASAW NATION,**  
**THE TUNICA-BILOXI TRIBE,**  
**THE ALABAMA-COUSHATTA TRIBE OF TEXAS,**  
**THE MUSCOGEE (CREEK) NATION, and**  
**THE QUAPAW TRIBE OF OKLAHOMA**  
**FOR IMPLEMENTING 36 CFR 800 REGARDING**  
**FEDERAL TRANSPORTATION PROJECTS IN MISSISSIPPI**

Validation of this Procedure by FHWA, MDOT, the SHPO, the Mississippi Band of Choctaw Indians, the Choctaw Nation of Oklahoma, the Jena Band of Choctaw Indians, the Chickasaw Nation, the Alabama-Coushatta Tribe of Texas, the Muscogee (Creek) Nation, the Quapaw Tribe of Oklahoma, and the Tunica-Biloxi Tribe, and implementation of its terms, evidences that the FHWA will ensure the aforementioned stipulations in order to comply with Section 106 of the National Historic Preservation Act (NHPA), as amended.

FEDERAL HIGHWAY ADMINISTRATION

By:   
Andrew H. Hughes, Division Administrator

Date: 9/16/16



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MISSISSIPPI STATE HISTORIC PRESERVATION OFFICER

By:  Date: 9-8-16  
Katie Blount, State Historic Preservation Officer

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MISSISSIPPI DEPARTMENT OF TRANSPORTATION

By: 

Melinda McGrath, Executive Director

Date:

8/3/16

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MUSCOGEE (CREEK) NATION

By:  Date: 4-8-16  
Executive Office of the Principal Chief James R. Floyd, Muscogee (Creek) Nation