

CDOT ARCHAEOLOGY AND HISTORY ANALYSIS AND DOCUMENTATION PROCEDURES

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INTRODUCTION

Overview: Federal Agencies and Section 106

Federal agencies are required to follow the process set forth in Section 106 of the National Historic Preservation Act (NHPA) when those agencies plan undertakings that have the potential to affect historic properties. The introduction of the regulation states:

Section 106 of the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on such undertakings. [36 CFR 800.1]

The Federal agency with jurisdiction over an undertaking is responsible for complying with Section 106. For most Colorado Department of Transportation (CDOT) projects, this agency is the Federal Highway Administration (FHWA). FHWA has authorized CDOT to conduct cultural resource surveys, recommend determinations of eligibility and effects, and consult directly with the State Historic Preservation Officer (SHPO) on its behalf. FHWA is legally responsible for the findings and determinations made during the Section 106 process, and determines whether the work done by CDOT fulfills the intent of the legislation. FHWA is also responsible for ensuring the Section 106 process is undertaken with enough time to plan for public coordination and SHPO review of a broad range of alternatives. Otherwise, the agency may be unable to document that it has fulfilled its responsibilities under Section 106.

When a project is determined to have adverse effects to historic properties, FHWA (or another federal agency with jurisdiction over an undertaking) will formally coordinate with the Advisory Council on Historic Preservation (ACHP). The ACHP is an independent Federal agency with the responsibility for implementing the Section 106 regulations and overseeing compliance with those regulations. In cases of an adverse effect to historic properties, FHWA must notify the ACHP and invite it to take part in consultation regarding those properties. The ACHP will often become formally involved in the review of the following types of projects:

- Projects with substantial impacts on important historic properties (including National Historic Landmarks, which also involve coordination with the National Park Service)
- Projects with important questions of policy or interpretation of Section 106 regulations
- Projects with the potential for procedural problems, public controversy, or litigation
- Projects of concern to Native American tribes that involve high-profile or problematic issues

Applicable Federal and State Laws and Regulations

A variety of laws and regulations stipulate the processes and procedures that must be followed in order to identify, document, evaluate, and consult on historic, archaeological, and other cultural resources during federal and state undertakings.

Federal Laws and Regulations:

- National Environmental Policy Act of 1969 (NEPA)
- Antiquities Act of 1906
- National Historic Preservation Act of 1966 (NHPA) (as amended)
- National Register of Historic Places Act, 36 CFR 60
- Determination of Eligibility, 36 CFR 63
- Advisory Council on Historic Preservation regulations, 36 CFR 800 (as amended)
- Executive Order 11593, Protection and Enhancement of the Cultural Environment
- Native American Graves Protection and Repatriation Act (NAGPRA) (as amended)

State Laws and Regulations:

- Historical, Prehistorical, and Archaeological Resources Act, CRS 24-80-401ff and 24-80-1301ff
- Colorado Register of Historic Places Act, CRS 24-80.1ff

THE SECTION 106 PROCESS

The Section 106 regulations and guidance materials describe a four-step process agencies must follow to assess the eligibility of historic properties and potential effects to these properties. Surveys conducted for CDOT undertakings often accomplish multiple steps under one transmittal letter to the State Historic Preservation Officer (SHPO) (determinations of eligibility and effect as well as preliminary recommendations for mitigation of adverse effects), but this depends on the project. The regulations recognize that agencies can conduct consultation on several steps at one time, as long as the process includes adequate time to consider the views of interested parties and the public. The archaeology and history units at CDOT usually submit separate transmittal letters to the SHPO, although they are sometimes combined.

Clearance Time Frames

The following are average time frames for completion of the Section 106 process dependent upon effects determinations, from notification to completion, if all necessary information is provided in a timely manner and there are no problems.

Archaeology reviews:

No Historic Properties Affected: approximately 50 calendar days

No Adverse Effect: approximately 100 calendar days

Adverse Effect: approximately 270 calendar days

History reviews:

No Historic Properties Affected – approximately 100 calendar days

No Adverse Effect – approximately 100 calendar days

Adverse Effect – approximately 320 calendar days

In general, eight to ten weeks is the minimum period for most project clearances from notification to completion, but if project design or plans have not been finalized, critical information has not been provided, or an adverse effect is expected, this time frame will lengthen. Note that these time frames assume a consultant is conducting the field work and preparing the survey report on behalf of CDOT. Less time may be required if CDOT completes the work in-house, unless the survey area is very large. The time frames also assume one submittal for the Area of Potential Effects (APE) and determinations of eligibility and effects. If the APE and determination of eligibility is submitted before the determination of effects, this will add at least an additional 30 calendar days to the schedule. If further consultation with the SHPO is required after the initial submittal, this will add at least an additional 30 calendar days to the schedule. However, Stipulation VIII.C.4 of the 2014 Section 106 Programmatic Agreement states that when SHPO requests additional information and CDOT provides that information in a timely manner, SHPO will complete their review within the original 30-day time frame.

Note that the above time frames do not include Section 4(f) evaluations. Section 4(f) evaluations add additional time to the schedule depending upon the effects finding.

Definition of “Undertaking”

Based on the Section 106 regulations, an “undertaking” is defined as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”

For each undertaking, whether within public right-of-way or on private land, CDOT Region Planning and Environmental Managers (RPEM) or Region environmental staff should provide a historical and archaeological clearance request to the Senior Staff Historian, Region 1 or 4 Historian, or Senior Staff

Archaeologist, as applicable. CDOT cultural resources staff will then follow the four-step Section 106 process prior to providing clearances for the project.

STEP 1: Initial Consultation with Participants in Section 106

The CDOT RPEM should notify the Senior Staff Historian and/or Senior Staff Archaeologist if he or she is aware of any parties with an interest in the undertaking. The appropriate Environmental Programs Branch staff specialist or Region historian will contact the members of Certified Local Governments (CLG), local historical societies, museums, historic preservation commissions, or other knowledgeable individuals who might be able to provide views or comments on an undertaking or have specific knowledge concerning historic properties. Notification of the public and/or historic preservation organizations and individuals will occur commensurate with the type of undertaking, its anticipated effects on historic properties, and the level of federal involvement. For large scale projects, the Mountains/Plains office of the National Trust for Historic Preservation and Colorado Preservation, Incorporated will be invited to participate in the Section 106 process.

STEP 2: Identification of Historic Properties

This step determines whether any resources that may be affected by an undertaking are listed on or have the potential to be eligible for listing on the National or State Registers of Historic Places. It is not necessary for a resource to be listed on the National Register of Historic Places (NRHP) to be afforded protection under the law, as eligible properties are also protected.

NRHP-eligible resources must meet certain criteria, including association with significant events or people; technological, engineering, or architectural significance; or the ability to yield information about a prehistoric or historic site. In addition to meeting the significance criteria, a resource must retain physical integrity or be able to demonstrate or communicate the qualities of its significance. Except under exceptional situations, cemeteries, birthplaces, churches, structures that have been moved from their original location, reconstructed structures, memorial or commemorative structures, and structures less than 50 years old, are not considered eligible to the National Register. Isolated artifacts and features also are generally evaluated as not NRHP eligible.

If a property is determined not eligible to the NRHP, the Section 106 process is completed. However, even though a property may not have the significance or integrity to be nationally eligible, it can still be eligible for or listed on the State Register of Historic Places. If so, it must be considered under the Colorado Register of Historic Places Act. In addition, some local governments in Colorado have historic preservation ordinances and/or lists of local landmark districts and properties. Some properties may be listed as locally significant, and impacts to these resources must be coordinated with the local government.

Please note that under 36 CFR 800.16(1)(1), the term “historic property” means “any prehistoric or historic district, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places.” When the term “historic property” is used in Section 106 consultation materials, the assumption is that it reflects the definition as outlined in the regulation.

Determine Undertaking’s Area of Potential Effects (APE)

In order to determine whether there are historic resources that could be affected by the undertaking, an Area of Potential Effects (APE) must be developed. The Senior Staff Historian, Region Historians, or Senior Staff Archaeologist, as well as the cultural resource consultant (if applicable), is responsible for determining and documenting the APE for each project. The APE is defined as:

The geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist. The area of potential effects is

influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking [800.16(d)].

Development of an initial APE by consultant staff must be completed in consultation with CDOT cultural resource staff prior to the intensive-level field survey. The APE is not necessarily determined on the basis of land ownership or legal parcel boundaries and does not necessarily end at the highway right-of-way boundary. The APE includes:

- All alternatives being considered for the undertaking
- All locations threatened with ground disturbance
- All locations from which the undertaking may be visible or audible
- All locations where the undertaking may result in changes in traffic patterns, land use, public access, etc.
- All areas where there may be indirect as well as direct effects

An APE is determined according to specific project circumstances. All potentially historic properties within the APE must be taken into account when assessing project impacts. An APE boundary may change during the course of a project as alternatives are modified, new alternatives are considered, or new impacts to historic properties are identified.

Determinations of Eligibility

Once properties over 50 years of age have been identified within the APE, the Senior Staff Historian, Region Historian, Senior Staff Archaeologist, and consultant (if applicable), evaluates each property for historical or archaeological significance and determines whether or not the property is eligible to the National or State Registers.

If it is determined that no historic properties exist within the APE, or that historic properties exist but will not be impacted by the work, or the work can be cleared without SHPO consultation under the Section 106 Programmatic Agreement (see Attachment 2, Screened Undertakings in the PA), then the Section 106 process is completed. However, if NRHP eligible properties exist and there is potential for impact to these properties, the project team continues to Step 2. In some cases, properties may be identified within the APE and newly documented for the project but determined not eligible to the NRHP or State Register. In these cases, consultation with the SHPO is still necessary in order to obtain SHPO concurrence that the properties are not eligible and the project will result in a finding of no historic properties affected.

STEP 3: Assessment of Effects

During this step, the Senior Staff Historian/Region Historian/Senior Archaeologist or cultural resource consultant determines how the project will affect any eligible or listed historic properties within the APE. Effects include direct, physical impacts to historic properties, as well as indirect or secondary impacts such as noise, visual, or atmospheric elements that may diminish a property's integrity or alter the qualities that make it eligible to the NRHP. There are three kinds of effects findings: *no historic properties affected*, *no adverse effect*, and *adverse effect*.

No Historic Properties Affected

A *no historic properties affected* finding occurs when the project has been determined to have no direct or indirect effects to a historic resource or there are no historic properties located in the APE [36 CFR 800.4(d)(1)].

No Adverse Effect

A *no adverse effect* finding occurs when the project has been determined to have a direct or indirect effect to an eligible or listed historic resource located within the APE, but the effect is considered minor. In order to not be adverse, the impacts to the property must not alter any of the defining characteristics that qualify the property as eligible to the NRHP, or diminish the integrity of the resource or its ability to

convey historic significance. This finding can also be applied when specific conditions are met to avoid an adverse effect. [36 CFR 800.5(b)].

Adverse Effect

An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify it for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association [36 CFR 800.5(a)(1)]. Adverse effects include, but are not limited to:

- Physical destruction or damage to all or part of a property
- Alteration of a property not consistent with the Secretary's Standards for the Treatment of Historic Properties [36 CFR 68]
- Removal of the property from its historic location
- Change of the character of the property's use or physical features within the property's setting that contribute to its historic significance
- Introduction of visual, atmospheric or audible elements that diminish integrity of the property's significant historic features
- Neglect of a property
- Transfer, lease, or sale of a property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance [800.5 (a) (2) (i-vii)]

If the determination results in a finding of *adverse effect*, resolution or mitigation of adverse effects to historic properties must occur in consultation with the SHPO and other interested parties (see Step 4).

STEP 4: Consultation with the SHPO and Participating Parties

Once historic properties are identified within the APE and determinations of eligibility and effects are made, the Senior Staff Historian, Region Historian, or Senior Staff Archaeologist will submit a letter, APE maps, survey reports, site forms, and other applicable documentation to the SHPO to initiate the consultation process.

According to the regulations, the SHPO has 30 days from receipt of the documentation to provide comments and concurrence to CDOT on the determination of the APE and recommendations of eligibility and effect. If they do not submit their comments within the 30-day period, CDOT assumes the SHPO has no comments. If the SHPO does not participate within the specified time frame for one phase of a project (i.e., eligibility determination), that does not preclude their participation in further phases of a project (i.e., determinations of effect, consultation, and final review of NEPA documentation).

If the project has been determined to have a finding of *no historic properties affected* for all resources within the APE, and the SHPO concurs with this finding, the Section 106 process is complete. If some properties in the APE have been determined eligible, and there is a finding of *no adverse effect*, the SHPO will either concur with these findings or request further consultation in order to come to an agreement on eligibility and effects for these resources. Once there is concurrence, the Section 106 process is complete. However, a finding of no adverse effect will usually require evaluation to determine if a Section 4(f) *de minimis* finding is applicable. The process for Section 4(f) compliance is separate from the Section 106 process and should be taken into account when planning for project clearance timelines.

If the project has been determined to have a finding of *adverse effect* to one or more historic resources within the APE, or if in additional consultation the SHPO determines there will be an adverse effect to a resource, then the adverse effect will need to be resolved and mitigated in consultation with the SHPO and consulting parties (discussed further under Step 4). Adverse effect findings may also require an extensive Section 4(f) process, including developing a Programmatic Section 4(f), a Net Benefit, or an

Individual Section 4(f) evaluation. This is a time-intensive process that is separate from the Section 106 process and mitigation, and should be taken into account when planning for project clearance timelines.

Consultation with Participants in Section 106

In addition to consulting with the SHPO on undertakings, CDOT will also invite other parties with an interest in the undertaking to participate in the consultation process and provide comments. These interested parties could include members of Certified Local Governments (CLGs), local historical societies, museums, historic preservation commissions, historic preservation non-profits, or other knowledgeable individuals who might be able to provide comments on an undertaking or have specific knowledge concerning historic properties. Other federal agencies, including the National Park Service, US Forest Service, Bureau of Land Management, Corps of Engineers, and Bureau of Reclamation might also be consulted regarding the undertaking, should the project occur on lands or within resources under their jurisdiction. Notification of the public, historic preservation organizations, and/or other agencies will occur commensurate with the type of undertaking, its anticipated effects on historic properties, and the level of federal involvement.

For some large scale projects, consultation with interested parties will occur early in the process and involve their input into development of the APE and identification of historic properties, as well as determinations of eligibility and effects. For smaller projects, CDOT will send a letter and relevant materials to the parties at the time of initial SHPO consultation. Consulting parties are generally given a 30-day period from receipt of the documentation to provide comments to CDOT regarding the project. If they do not submit their comments within the 30-day period, CDOT will assume they do not wish to comment on the project. While it is essential for CDOT and the SHPO to come to agreement on the APE and determinations of eligibility and effect, consulting parties may not necessarily agree with these findings or may suggest other resources that should be taken into account or changes in design or impacts. While CDOT is not obligated to change project findings and determinations based on consulting party comments, it must take comments into account and notify the SHPO regarding comments of substance. In some cases, information or concerns provided by the consulting parties may cause the SHPO to reconsider initial findings or request additional information on resources or the project scope.

STEP 5: Resolution of Adverse Effects

In the case of a finding of *adverse effect* to a historic resource, the adverse effect must be resolved and mitigated. The purpose of this step is to develop strategies that avoid, minimize, or mitigate adverse impacts to historic properties but also meet the basic objectives of all interested stakeholders. Measures to mitigate negative impacts to historic properties include adjusting the proposed alignment to avoid impacting the resource, moving the resource to a new location (which generally does not apply to archaeological localities), and, as a last resort, photographic and written recordation of the resource prior to demolition. “Creative mitigation” should also be considered. These options can include, but are not limited to, educational outreach and interpretive mitigation such as brochures, signage, displays, historic contexts, websites, interactive maps, and other measures developed in consultation with the SHPO and consulting parties. Ideally, alternatives that avoid historic properties will already have been considered prior to this step.

FHWA notifies the ACHP of an *adverse effect* determination and provides specific documentation for their review of the project. In addition, FHWA must invite the ACHP to participate in the consultation of adverse effects when:

- FHWA wants the ACHP to participate (i.e., for controversial or high-profile projects)
- The undertaking will have an *adverse effect* on a National Historic Landmark
- The project will result in the preparation of a Programmatic Agreement (a document intended to address adverse effects for complicated projects or for repetitive projects that result in expected outcomes)

The ACHP is given 15 days from receipt of the documentation to determine whether or not they will participate in a project. If a response is not received within that time frame, the agency continues the consultation without ACHP involvement. The ACHP developed an Electronic Section 106 Documentation Submittal System (e106) for use by federal agencies and their delegate agencies in submitting adverse effect findings. This system has expedited this step in the process. The adverse effect documentation is typically developed internally by CDOT Cultural Resources Section staff using the template provided by ACHP for their e106 system. This information is sent by CDOT to FHWA, who will then convey the submittal to ACHP via the e106 system.

Memoranda of Agreement (MOA)

To resolve adverse effects to historic properties on a project-by-project basis, a Memorandum of Agreement (MOA) is developed that outlines agency responsibilities to avoid, minimize, or mitigate adverse effects. In virtually all cases, CDOT Cultural Resources staff, including Region Historians, develop and facilitate project-specific MOAs. Similar to resources in the historic built environment, NRHP-eligible or listed archaeological sites, which were exempt from this process prior to 1999, are also subject to development of a MOA prior to data recovery excavations. If the ACHP elects to join the consultation, a MOA is executed with its participation. If not, the agreement is developed and executed by FHWA and the SHPO, with CDOT as an invited signatory. In addition, the agencies may invite other organizations (i.e., Indian tribes, local historic preservation commissions, etc.) to participate as invited signatories in the development of a MOA if those entities will assume a specific role or responsibility as outlined in the MOA. Other interested parties lacking explicit action items or responsibilities may be invited to sign the document as concurring parties.

The execution and implementation of the stipulations in a MOA provides evidence of FHWA's compliance with Section 106. The MOA is submitted to the ACHP for filing, and CDOT, on behalf of FHWA, ensures the mitigation stipulations are carried out. Unless project circumstances change and other potentially historic properties will be affected by an undertaking, or CDOT/FHWA is unable to fulfill the MOA stipulations, the Section 106 process is considered complete when the MOA is executed and filed with ACHP.

STREAMLINING INITIATIVES

Section 106 Programmatic Agreement (Section 106 PA)

Executed in 2014, the Programmatic Agreement (PA) outlines the Section 106 process carried out by CDOT on behalf of FHWA. The agreement replaces an earlier PA (2010), the Historic Bridge Programmatic Agreement (2003), the Section 106/State Register Act Procedures Memorandum of Agreement (1996), the Minor Highway Improvement Projects Programmatic Agreement (1991), and the Negative Finds Memorandum of Understanding (1989). The PA outlines the steps in the Section 106 process and provides guidance for projects that do and do not require consultation with SHPO and consulting parties. Also included are stipulations regarding consultation with Native American Tribes, treatment of Native American human remains, use of the Interstate Highway Exemption and the Program Comment on Post-1945 Concrete and Steel Bridges, guidelines for the development of historic bridge inventories, and an updated stipulation regarding emergency situations. The PA also includes attachments that outline CDOT's typical procedures for delineating the APE, a discussion of screened undertakings that do not require consultation with the SHPO (Attachment 2), guidelines for documenting and evaluating linear resources, and a discussion of undertakings that are exempt from Section 106 review by CDOT Cultural Resources staff (Attachment 6). Attachment 2, the stipulation of projects exempted from SHPO consultation, is designed to increase the efficiency of the Section 106 process. Known as "screened undertakings," these actions have effects to historic properties that are foreseeable, likely to be minimal, or will have no effect at all. The PA outlines an internal review process for determining whether projects are exempt from further review, and provides a detailed list of the types of screened undertakings that may be exempt from further Section 106 and consultation with the SHPO and consulting parties.

The Senior Staff Historian, Region Historians, and/or Senior Staff Archaeologist will determine how the Section 106 PA applies to projects, and will prepare a memorandum to the appropriate Region that references the project and the relevant section of the PA. This memo serves as the clearance required for historic properties.

INTERNAL REQUESTS FOR CULTURAL RESOURCES CLEARANCES BY CDOT STAFF

For most Categorical Exclusions and other types of small-scale undertakings, the Senior Staff Historian, Region 1 or 4 Historians, and/or Senior Staff Archaeologist (or their staff) will conduct a file search of the Office of Archaeology and Historic Preservation Compass database, as well as a pedestrian survey, as appropriate, and prepare the necessary reports and paperwork, time and schedules allowing. Otherwise, projects are forwarded to the statewide cultural resources consultant under contract to the Environmental Programs Branch or through Region non-project specific contracts. Surveys for local agency projects are often facilitated by consultants selected by the local jurisdiction and are forwarded to CDOT staff for review and Section 106 consultation. Project coordination involves completing archival research, a field survey, preparing reports and letters, and forwarding documentation to the SHPO, FHWA, ACHP, or other agencies, as necessary. Meetings with the SHPO will be scheduled as needed by the CDOT Headquarters and Region Historians, and on rare occasions by the Senior Staff Archaeologist. Copies of all correspondence will be forwarded to the Region Planning and Environmental Managers or Region environmental project manager for their files. Aside from the Region 1 and 4 Historians, Region staff should refrain from directly contacting the SHPO or other oversight agencies at any point in the project development or implementation process. CDOT Cultural Resources staff, in coordination with FHWA, will complete all interagency coordination.

Process for Requesting and Completing Historical Resource Clearances

The RPEM or Region environmental project managers are encouraged to contact the Senior Staff Historian or appropriate Region Historian as early as possible to discuss undertakings that have the potential to impact historic properties, objects, or structures. Early contact can also assist Region staff and the Historians in determining if the scope of work can be facilitated by Cultural Resources staff or if a consultant will be needed. The decision to hire a consultant will depend upon the scope of work, the number of documented or potential historic resources within the project area, and current Cultural Resources staff workload. Ideally, the RPEM should first consult with the Senior Staff Historian or Region Historians as appropriate prior to making a determination to hire a consultant in order to ensure that resources and funds are allocated most effectively. In addition, it is important to identify potential historic resources early in the planning phase to allow enough time for coordination with regulatory agencies and other interested parties. Section 106 also requires coordination with local historic preservation commissions and Certified Local Governments (CLG's) if they have jurisdiction within the project area.

Resources fifty years or older are evaluated to determine if they are historically significant; however, resources less than 50 years old are surveyed if they have exceptional significance or contribute significant information to the historical record. Typical historic resources include buildings, residential neighborhoods, commercial districts, agricultural complexes, bridges, irrigation canals and ditches, roads, and railroad lines. Less obvious resources include structure foundations, trails, sidewalks and curbs, and landscape features, including vegetation. All projects that cannot specifically be cleared for history by Region staff under Attachment 6 of the Programmatic Agreement, should be sent to the Senior Staff Historian, or Region 1 or 4 Historian as appropriate, for review and clearance. Only qualified historic staff can determine if historic resources will be affected by the project. RPEMs should notify the Senior Staff Historian or appropriate Region Historian if they are aware of particular historic concerns, such as a historic district in or adjacent to the project area, irrigation ditches, railroad lines, or properties from which easements and/or right-of-way will be obtained.

Information Required to Initiate a Historical Clearance

The following information should be included in a historical clearance request:

1. Project number and name.
2. Appropriate accounting data, including sub account.
3. Brief description of the project scope. This does not have to be extensive, but should be detailed enough to include an overview of the variety of work being done.
4. Physical dimensions of the study corridor, including beginning and ending mileposts and corridor width.
5. A map, USGS topographic quadrangle, or Google Earth image or kmz file, clearly showing the location and extent of the proposed undertaking.
6. Engineering and design plans, including preliminary plans, if available. If these are not available, please forward when they are available.
7. In order for a clearance to be provided in a timely manner, a specific due date must be furnished. Please note that most clearances require an average of at least 8-10 weeks for review and completion. If the project is complex and/or requires consultation with the SHPO, this timeline will need to be extended. Never assume that because a project seems minor, it will take less time; sometimes minor projects require SHPO consultation and even Section 4(f) review.
8. If temporary or permanent easements or right-of-way (ROW) acquisition beyond the existing ROW are required to accommodate detours, line-of-sight improvements, shoulder widening or material source areas (among others), this should be noted and right-of-entry forms obtained and forwarded to the Senior Staff Historian or Region Historian, as appropriate. Forward right-of-way plans once they become available, as the plans are essential to completing review, consulting with the SHPO, and issuing clearances. In some cases, if ROW plans cannot be furnished, consultation can be initiated using worst-case scenario exhibits of the location and size of the easements or ROW acquisitions.
9. Photos of the project area and resources of concern (if available).
10. Brief descriptions of resources to be impacted, i.e., CDOT bridge structure numbers and locations, irrigation ditches, historic districts, railroads, etc.
11. Note in the clearance request if the project will not use federal funds or if the project is an access or special use permit request. State or locally funded projects do not go through the Section 106 process, but do require review and, if appropriate, SHPO consultation under the Colorado State Register Act. Likewise, access and special use permits, while not subject to Section 106, do require a historic review.
12. If a project has been cleared and there are changes to the scope of work, issue a revised clearance request that highlights the previous scope and revised scope. If a project was cleared over five years ago, a revised clearance request is required so cultural resources staff can determine if there are resources that have reached the 50-year minimum age threshold during that time frame. Keep in mind that just because a project was initially cleared internally without SHPO review, a scope change may require SHPO consultation.

If a project area is located partially or entirely on lands administered by a federal land managing agency such as the US Forest Service or Bureau of Land Management, the Historian will notify the cultural resources staff at that agency. In some cases, the federal agency will take the lead on cultural resource issues or consultation, in which case all Section 106 administrative responsibilities and obligations will be completed by that agency, even though CDOT staff may conduct archival and field research and assemble the submittal for the other agency to send to SHPO.

When consulting firms contract with CDOT Regions or with local agencies to conduct historic surveys, the Senior Staff Historian or Region Historian, as appropriate, must be informed of the firm and copied on all pertinent correspondence. The appropriate Headquarters or Region Historians must be involved early in the process to identify the APE and potential historic resources, and determine the level of survey and documentation needed. All completed historic survey documentation and materials should be sent to the

Historian assigned to the project. That Historian will review the consultant materials and request any needed revisions prior to submitting the materials to the SHPO. Projects for which consultants have been contracted should take into account the additional time needed for project coordination, documentation review and set the due date for clearances as appropriate.

Process for Requesting and Completing Archaeological Resource Clearances

At the earliest possible date in the planning process for a proposed undertaking, the RPEM or Region environmental project manager should forward to the Senior Staff Archaeologist a request for an archaeological clearance. Archaeological investigations initiated by private contractors for activities associated with CDOT projects, such as undesignated material sources and equipment staging areas, are the responsibility of the contractor. It is imperative that project managers and contractors are made aware of their responsibilities in this regard, and that all appropriate permits and clearances are obtained prior to initiating ground disturbance for any activity peripheral to actual construction.

Information Required to Initiate an Archaeological Clearance

The following information should be included in an archaeological clearance request:

1. Project number and name.
2. Appropriate accounting data, including sub account.
3. Brief description of the project scope. This must be detailed enough to include an overview of the variety of work being done.
4. Physical dimensions of the study corridor, including beginning and ending mileposts and corridor width.
5. A map, USGS topographic quadrangle, or Google Earth image or kmz file, clearly showing the location and extent of the proposed undertaking.
6. Engineering and design plans, including preliminary plans, if/when available.
7. In order for a clearance to be provided in a timely manner, a specific due date must be furnished. Note that most clearances require an average of 8-10 weeks for review and issuing. If field survey is required, the timeline may need to be extended.
8. If temporary or permanent easements or property acquisition beyond the existing ROW are required to accommodate detours, line-of-sight improvements, shoulder widening or material source areas (among others), this should be noted and right-of-entry forms obtained and forwarded to the Senior Staff Archaeologist.
9. Field and archival investigations should generally be scheduled for completion by the Field Inspection Review.

Scheduling archaeological fieldwork must take into consideration seasonal conditions. Projects with winter due dates should be requested in the summer or early fall. Although field surveys can be conducted in many parts of the state throughout the year (weather permitting), even a thin blanket of snow can potentially terminate inventory plans.

Although the SHPO generally does not require initial consultation on archaeological projects, larger and/or more complex undertakings may require SHPO involvement in determining the Area of Potential Effects (APE). If a project is located on Indian reservation land, the Tribal Historic Preservation Officer (THPO), if designated, may formally assume responsibilities of the SHPO. The SHPO/THPO has 30 days in which to respond to a request for consultation. Tribal groups sometimes attach religious and cultural significance to properties beyond reservation boundaries, and these tribal entities, in addition to local governments, the general public and other specific interested parties, also have a right to consult about heritage resource issues in the context of Section 106 and the National Environmental Policy Act (NEPA) (see “Native American Consultation” section below).

If a project area is located partially or entirely on lands administered by a federal land managing agency such as the US Forest Service or Bureau of Land Management, the Senior Staff Archaeologist will initiate

consultation with the cultural resources staff at that agency. In many instances, the federal agency will take the lead on cultural resource issues, in which case all Section 106 administrative responsibilities and obligations will be completed by that agency, even though CDOT will conduct archival and field research.

Contact with the ACHP is generally unnecessary as part of the initial archaeological consultation process. ACHP consultation is sought for undertakings involving federal funds, properties or permits, and usually only when historic or archaeological properties will be adversely affected.

When consulting firms contract with CDOT Regions to conduct archaeological investigations, the Senior Staff Archaeologist must be informed of the name and qualifications of the firm. The CDOT Archaeologist will initiate consultation with the SHPO/THPO and any appropriate federal agencies regarding the nature and extent of the consultant's proposed work.

REQUIREMENTS FOR CONSULTANTS CONDUCTING SURVEYS

All consultants are expected to perform field surveys in accordance with the Secretary of Interior's Standards for Archaeology and Historic Preservation and the "Colorado Cultural Resource Survey Manual: Guidelines for Identification: History and Archaeology" (http://legacy.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1527.pdf) developed by the Office of Archaeology and Historic Preservation (OAHP). Prior to initiating work on an undertaking, consultants must coordinate directly with the appropriate CDOT cultural resource staff to discuss project approach. Consultants are required to conduct an OAHP file search prior to field investigations and review all pertinent maps and written information pertaining to previous inventories and documented sites, if applicable. It may be necessary to search other archival sources as well (i.e., federal agency files). In most cases, all sites surveyed will be recorded in their entirety, even if they extend beyond the limits of the project area. For historic sites, consultants are encouraged to discuss survey results and preliminary determinations of eligibility with CDOT staff in order to confirm that all pertinent information has been collected for the survey. In most cases, the consultant is responsible for assessing effects to and providing preliminary effects determinations for historic and archaeological resources if or when design plans have been created for specific transportation projects. The assessment of effects should be undertaken in close consultation with the Senior Staff Historian, appropriate Region Historian, and/or Senior Staff Archaeologist. However, effects determinations should not appear in survey reports, but only in letter transmittals submitted to the SHPO.

Consultants must submit all documents generated by the survey to the Senior Staff Historian, Regions 1 or 4 Historians, or Senior Staff Archaeologist, as appropriate, who are responsible for direct coordination with the SHPO. Where a federal land managing agency has assumed the duties of Section 106 "lead agency" for a project, the Headquarters or Region Senior Staff Historian/Archaeologist will forward all documentation to that agency, which will review the findings and subsequently send it to the SHPO.

Under no circumstances should a consultant, its client and/or a local agency send final documents or correspondence regarding specific projects directly to the SHPO. CDOT Cultural Resources staff must facilitate all agency coordination.

Required Documentation for Historic and Archaeological Surveys

Consultants conducting field surveys must submit the following documentation:

- Historic and/or Archaeological Resource Survey Report (if requested, and dependent upon the scale of the project) formatted according to the OAHP survey guidelines. The report should include the following elements:
 - Survey methodology. *Note that any alternative survey methodologies should be discussed with the CDOT cultural resources staff prior to implementation. For example,*

“treating” properties as NRHP eligible can be used to expedite the identification process, but this approach should only be considered for specific project conditions and not as a standard approach to survey.

- Explanation and justification of the Area of Potential Effects (APE) boundaries.
- Narrative of the identification, documentation, and evaluation of prehistoric and historic resources encountered in the APE, including recommendations of NRHP eligibility for each resource. *Determinations of Effects should not be included in survey reports; results and recommendations should be limited to determinations of eligibility only.*
- Copies of 7.5 minute US Geological Survey (USGS) topographic quadrangle maps (or other scaled maps) with the APE clearly marked, showing the location of all cultural resources present in the survey area.
- The appropriate OAHP Survey and Inventory Record Forms for each documented historic and archaeological resource. Consultants should review the OAHP instructions for each form to be sure they are using the correct form(s) for each resource, and are completing the forms accurately and including all required information and documentation. Copies of forms and instructions are available on the OAHP website (<http://www.historycolorado.org/oaHP/survey-inventory-forms>).
 - 7.5 minute USGS topographic maps and photographs (color is preferred but black and white is acceptable) should be included with each form. Maps and photographs may be embedded in the body of the form or submitted as separate digital files. While photographic prints are permissible, digital copies are preferred. Consultants should review the OAHP “Historical and Architectural Photography” guidelines (http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1527photo.pdf) for more specific information about acceptable photographic documentation.
- For historic surveys necessitating SHPO consultation, a draft Determination of Eligibility and Effects letter should be prepared. Samples of these letters are available from the Headquarters and Region Historians.
- All draft materials should be submitted electronically and, if requested, in hard copy. Final versions prepared after CDOT staff have reviewed the materials should be submitted both electronically and in hard copy. Consultants must provide a minimum of three hard copies of a final survey report, APE maps, and site forms for CDOT, SHPO, and each consulting party. All reports, site forms, and other documentation must be printed double-sided. Additional copies may be required depending on the number of consulting parties involved in the Section 106 process. Site forms should *not* be included in bound reports that are limited to archaeological resources.

Consultant Minimum Qualifications

- All tasks must be performed by individuals meeting the criteria established by the Secretary of the Interior’s Professional Qualification Standards for History, Archaeology, Architectural History, or Historic Preservation (as appropriate). All work related to the evaluation of built environment resources (e.g., file search, field work, preparation of reports and memoranda) should be performed by an individual meeting the Secretary of the Interior’s Professional Qualification Standards for History, Architectural History, or Historic Preservation. An archaeologist who does not meet these standards may survey archaeological or historic archaeological resources, but should not be assigned to survey and document built environment resources.
- Consultants must have documented experience in completing historical or archaeological studies (as appropriate) under the requirements of Section 106 of the NHPA and the State Register of Historic Places Act.
- Consultants must have direct experience working with the Colorado SHPO on cultural resource surveys and project coordination.

- At minimum, archaeological consultants must possess a current State of Colorado Archaeological Non-Collection Survey Permit. When applicable, permits must also be obtained prior to project initiation from federal land managing agencies and Indian tribes.
- All archival, field, and laboratory investigations and resulting documentation will follow SHPO/THPO guidelines and other state and federal specifications, as appropriate.
- Consultants documenting architectural resources must have a background in history or architectural history and/or experience documenting architectural and built environment resources, including residential, commercial, and industrial properties and complexes; ranch and farm complexes; linear resources (including roads, railroads, and irrigation ditches); and potential historic districts. Archaeologists who are contracted to document architectural and other built environment resources should also meet the Secretary of Interior’s Standards for History, Architectural History, or Historic Preservation.

INFORMATION REQUIRED IN NEPA DOCUMENTS

Information related to Section 106 compliance is required in Environmental Impact Statements (EIS) and Environmental Assessments (EA) prepared for FHWA/CDOT projects, as stipulated in the National Environmental Policy Act. The format of these documents should comply with the CDOT NEPA Manual (<https://www.codot.gov/programs/environmental/nepa-program/nepa-manual>). The historic properties data must be well-prepared, consistent, and legally sufficient. NEPA document sections should be thorough, containing all relevant information related to the status and disposition of historic and archaeological resources within the study area, yet brief, omitting data that has no bearing on the transportation decision made as a result of the Decision Document.

Depending on the document and the resources present in an APE, historic and archaeological resources can be discussed either jointly or independently.

NEPA documents should contain the following information regarding historic and archaeological resources:

- Section title: “Historic and Archaeological Preservation.” Subsection titles: “Historic Resources” and “Archaeological Resources.”
- *Brief* overview of the “whys and whats” of Section 106, i.e., “Section 106 of the National Historic Preservation Act, and implementing regulations found in 36 CFR 800, require that federal agencies consider the effects of their undertakings on properties eligible for or listed on the National Register of Historic Places (NRHP). The Section 106 compliance process involves four steps...” (etc.).
- *Brief* description of SHPO consultation regarding methodology(s) and development of the APEs, file searches and field inventory(s).
- Include the number and types of historic properties, and (particularly for historic resources). Include under which NRHP criteria they are eligible. Use data tables whenever feasible, especially if many properties are present. *Avoid* lengthy narrative site descriptions or repeating information previously covered in associated survey reports or technical memoranda.
- Omit specific information regarding non-NRHP eligible resources. Focus on properties that require protection under the law (i.e., are NRHP eligible or listed).
- NRHP eligible archaeological sites are sensitive resources that are exempt from the provisions of the Freedom of Information Act (FOIA), and should *never* be reflected on maps or otherwise have specific locational data included in a NEPA document. Historic resources, however, should be illustrated on maps, including on the APE boundary map.
- *Be specific* when discussing effects and proposed mitigation of adverse effects for eligible sites. Use appropriate Section 106 language, i.e., *no historic properties affected, adverse effect, no adverse effect.*

- Insert all interagency correspondence with the SHPO and other involved agencies or entities (including the public) in a Correspondence appendix of the NEPA document. It is unnecessary to include survey reports either in an appendix or elsewhere in an EA or EIS.

NATIVE AMERICAN CONSULTATION PROCEDURES

As stipulated in the NHPA and the revised ACHP regulations, federal agencies must afford the Native American community a reasonable opportunity to participate in and comment on federal undertakings in the context of the Section 106 process. According to 36 CFR 800.2(c)(2)(ii), the "...agency official [must] consult with any Indian tribe...that attaches religious and cultural significance to historic properties that may be affected by an undertaking, ...regardless of the location of the historic property [on or off tribal lands]." Because federally recognized tribes are by law considered sovereign nations, FHWA is obligated to initiate government-to-government cultural resource consultations on transportation projects for which federal funding or a federal action is involved. FHWA has delegated most day-to-day consultation activities in this regard to CDOT. The CDOT Senior Staff Archaeologist is the individual charged with undertaking and/or coordinating Native American consultation on a project-by-project basis.

Tribal consultation will generally proceed as follows:

- Tribal consultation is required for every federal-aid transportation project in Colorado for which an Environmental Assessment (EA) or Environmental Impact Statement (EIS) is prepared. Smaller projects (generally at the Categorical Exclusion level) involving unique or controversial issues of potential significance to Native Americans may also involve consultation, at the discretion of FHWA and the Senior Staff Archaeologist.
- Per delegation of the day-to-day facilitation of tribal consultation from FHWA, the CDOT Senior Staff Archaeologist will initiate and complete most tasks in the consultation process, or must approve in advance a consultant to conduct the work under his supervision. In all cases, however, the Senior Staff Archaeologist must be notified and will coordinate this work.
- Over forty tribes located throughout the Plains, Southwest and greater Intermountain West have some level of interest in historic properties consultation in Colorado on a county-specific basis. The Senior Staff Archaeologist has developed a complete and updated list of tribes and tribal contacts, each of which is cross-referenced by county.
- The RPEM should notify the Archaeologist early in the EA/EIS planning process in order for consultation to be properly coordinated. Information regarding the proposed undertaking (i.e., a statement of purpose and need or project overview) must be forwarded to the Archaeologist so that data can be transmitted to the Native American community in a succinct manner.
- In most cases, consultation is initiated when FHWA sends a letter to the tribal chairman and/or other designated representative(s) outlining the proposed undertaking and requesting government-to-government consultation, at the discretion of the tribe.
- In some cases, two to three weeks after the letter has been sent a follow-up telephone call is made to each tribe to ensure receipt of the correspondence, to solicit input, and to answer questions, as appropriate. Repeated phone calls, faxes or emails may be necessary in order to guarantee that the information has reached the correct individual or office. However, if contact with a responsible tribal member has not been established after four phone calls (or other means) following the initial letter, a sufficient effort is presumed to have been made and no further actions are necessary.
- FHWA/CDOT is obligated to acknowledge and address any comments, questions or concerns voiced by tribes regarding an undertaking. It may be necessary to coordinate one or more meetings and/or visits to a project area involving interested tribal members. All travel costs, lodging, per diem and/or consultation fees incurred by tribes as a result of these meetings are the responsibility of the agency, as outlined in Executive Order 13175, *Consultation and Coordination With Indian Tribal Governments*. Vehicle mileage, lodging and per diem costs are established by CDOT based on existing rates that vary depending on location, and therefore these

costs may fluctuate from one project to the next. The daily consultation fee (or “honorarium”) is a fixed price based on comparable agency rates for the Section 106 process. CDOT has developed and implemented a compensation policy to guide the payment of fees and expenses during consultation.

- The Senior Staff Archaeologist and/or his designated representative(s) will document the consultation process. Depending on the complexity of the undertaking and other factors, a report or summary outlining the consultation process and its results may be required.
- At the time a Decision Document is prepared for a project, and only if there are no outstanding issues, the archaeologist prepares and sends a letter to all the consulting tribes notifying them that FHWA desires to close the initial phase of the consultation process. This does not abrogate the rights of the consulting tribes under Section 106, as they will retain consultation status throughout project construction.

It is important to note that as sovereign nations, Native American tribal governments are not bound by many of the rules and regulations established for standard interagency coordination. For example, whereas agencies such as the SHPO must ordinarily respond to written, policy level correspondence within 30 days, tribes are under no such time constraints. Consequently, time frames for consultation may vary widely, and according to federal statute tribes may enter the consultation process at any time. However, both FHWA and CDOT prefer to initiate contact early in the planning stages of a project in order to encourage tribes to enter the consultation process in a timely fashion.

Detailed information regarding Native American consultation must be present in the EA or EIS, but must not contain information considered sensitive or privileged by a tribe. A separate subheading for consultation under the Historic and Archaeological Resources section is generally the most appropriate location for this information. In most cases the CDOT Senior Staff Archaeologist will provide the consultant with language specific to the consultation process for inclusion in the NEPA document.

ADDITIONAL RESOURCES

- CDOT Cultural Resources Program:
<https://www.codot.gov/programs/environmental/archaeology-and-history>
- 2014 Executed and Amended Programmatic Agreement:
<https://www.codot.gov/programs/environmental/archaeology-and-history/106-programmatic-agreement-1/view>
- CDOT NEPA Manual, Version 5 (2017) (see Chapter 9.10 for historic resources):
<https://www.codot.gov/programs/environmental/nepa-program/nepa-manual>
- Section 4(f) Policy Paper:
<https://www.environment.fhwa.dot.gov/legislation/section4f/4fpolicy.aspx>
- Section 4(f) Exceptions and de Minimis Memorandum of Understanding:
<https://www.codot.gov/programs/environmental/section-4-f/section-4-f-exceptions-and-de-minimus-mou/view>
- CDOT Section 4(f) De Minimis Guidance:
<https://www.codot.gov/programs/environmental/resources/guidance-standards/cdot-4-f-de-minimis-guidance/view>