

**BOARD OF COUNTY COMMISSIONERS**

**OFFICE OF COUNTY ATTORNEY**

Dylan Reingold, County Attorney  
William K. DeBaal, Deputy County Attorney  
Kate Pingolt Cotner, Assistant County Attorney



*Via Email*

March 7, 2016

Mr. Michael Johnsen  
Federal Railroad Administration  
Office of Railroad Policy and Development  
1200 New Jersey Avenue, SE  
Washington, DC 20590  
michael.johnsen@dot.gov

Re: Draft Programmatic Agreement, All Aboard Florida Project

Dear Mr. Johnsen:

I am writing in response to your email dated February 26, 2016, in which you (i) notify the Consulting Parties that a Section 106 Programmatic Agreement ("PA") for the proposed All Aboard Florida Project (the "Project") has been agreed upon by the Federal Railroad Administration ("FRA"), All Aboard Florida-Operations, LLC ("AAF"), the Florida State Historic Preservation Office ("SHPO") and the Advisory Council on Historic Preservation ("ACHP") and (ii) attach a copy of the final draft of the PA.

As a Consulting Party in the Section 106 process for the Project, Indian River County (the "County") appreciates the opportunity to provide comments on the draft PA. In its review, the County has noted material omissions and significant issues with the current version of the draft PA. Attached are comments on the draft PA organized by section, as well as a corresponding redline of the draft PA reflecting those changes the County urges the signatories to make. Certain of the more significant issues noted by the County include the following, which are discussed more fully in the attached comments.

- **The PA applies to the Project even if FRA does not approve the RRIF loan.** The draft PA indicates that it is applicable to the Project only if FRA approves AAF's RRIF application. This statement is incorrect, because the Project must comply with the measures developed under the Section 106 process by virtue of the RRIF loan and/or the issuance of private activity bonds ("PABs"), the other means AAF proposes to use to finance Project construction. The United States Department of Transportation ("USDOT") approved the PABs for the Project by

letter dated December 22, 2014 (copy attached), which (by requiring implementation of the mitigation measures called for in the FEIS) requires compliance with the PA if PABs are issued. The PA must be revised to make clear that the Project must comply with the terms of the PA upon either the approval of the RRIF loan or the issuance of PABs.<sup>1/</sup>

- **Indian River County was omitted as a Consulting Party.** The draft PA fails to identify and include the County as a Consulting Party.
- **The list of Archeological Sites Covered by the PA must include the Campbell Site and Six Higher Probability Archeological Sites along the FECR Corridor located in Indian River County.** The County identified these sites in documentation submitted to FRA in advance of the one consultation meeting by letter dated October 16, 2015 (copy attached). These sites should receive the same protections as the other archaeologically sensitive sites under the Archaeological Monitoring/Unanticipated Discoveries Plan. In addition, the list of archaeological sites appearing in the body of the PA does not match the list in Table 8 attached to the PA.
- **The “Archaeological Monitoring/Unanticipated Discoveries Plan” that is required to be implemented by the PA was not attached to the PA, nor does it appear to have been reviewed by FRA, ACHP or the Consulting Parties.** A draft archaeological monitoring plan was provided to the Consulting Parties in September 2015, in advance of the one Consulting Parties meeting that was held in October 2015. However, no revised plan has been circulated to the Consulting Parties nor is it attached to the draft PA.
- **The Independent Archaeological Monitor must have the authority to raise concerns.** The appointment of an Independent Archaeological Monitor (“IAM”) is an excellent concept. However, in order for the IAM’s role to be meaningful, a mechanism must be included in the PA to allow the IAM to raise concerns with the Project Archaeologist and FRA, and for FRA to address those concerns, including by issuance of a stop-work order, if necessary.
- **Consulting Parties must be kept abreast of the developments during implementation of the Project.** The County strongly believes that it is essential for the Consulting Parties to be kept abreast of developments during implementation of the Project. At an absolute minimum, a conference call to provide status reports should be held once a month with the Consulting Parties. If the Consulting Parties only receive status reports on a six month basis it is

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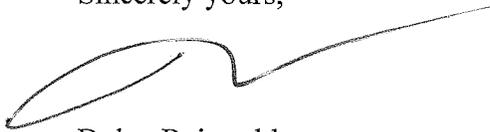
<sup>1/</sup> In addition, AAF requires permits from both the United States Army Corps of Engineers and the United States Coast Guard for construction of the Project. Those agencies must comply with Section 106 prior to taking those actions.

possible that they would only receive one or two such updates, assuming the Project were to be constructed in the short time period suggested by the FEIS.

Please refer to the attached comments and redline for greater detail about these comments, and for our other comments on the PA. Please also feel free to get in touch with Dylan Reingold at dreingold@ircgov.com and Kate P. Cotner at kcotner@ircgov.com with any questions about these issues.

Finally, although the County is providing comments on the draft PA within the extremely short 6-day timeframe requested in your email, please be advised that in doing so the County is in no way waiving its objections to FRA's defective Section 106 process for the AAF Project, which have been detailed in previous correspondence to FRA. To date, FRA has held one meeting with the Consulting Parties in October 2015, well after issuance of the FEIS, and there has been no further communication regarding the consultation until FRA transmitted the final draft of the PA to the Consulting Parties. Moreover, nothing in this communication should be interpreted as waiving the County's position that the USDOT's approval of the PABs constituted an action and undertaking pursuant to applicable environmental and historic review laws.<sup>2/</sup>

Sincerely yours,



Dylan Reingold  
County Attorney

Cc: Michael Johnsen, FRA  
Tim Parson, SHPO  
Charlene Vaughn, ACHP  
Chris Wilson, ACHP  
Michael Reininger, AAF  
Andrew Phillips, United States Army Corps of Engineers  
United States Coast Guard – Seventh Coast Guard District  
Consulting Parties

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<sup>2/</sup> The County has commenced litigation against USDOT in connection with its failure to comply with the National Environmental Policy Act, Section 106 and Section 4(f) prior to issuance of the PAB allocation approval. By submitting these comments, and by otherwise participating in the consultation the County is not waiving any of the claims it has asserted in that litigation.

**The Board of County Commissioners of Indian River County, Florida**

Comments on Draft Programmatic Agreement Dated February 26, 2016 for the  
All Aboard Florida, Orlando to Miami, Florida Intercity Passenger Rail Project

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1. **4<sup>th</sup> Whereas Clause**. As drafted, this clause incorrectly indicates that the Programmatic Agreement (“PA”) is applicable to Project construction only if FRA approves AAF’s RRIF application. The “Provisional Bond Allocation Approval Letter” issued by the U.S. Department of Transportation on December 22, 2014 (copy attached as Exhibit A), explicitly states:

AAF agrees that if the bonds are issued for the development and construction of the Project, AAF shall cause its subsidiaries to complete and implement the measures specifically set forth in the EIS and any supplemental EIS... to avoid, minimize, or mitigate any adverse effects of the Project on the environment.

Accordingly, AAF must implement the mitigation measures required by the FEIS if private activity bonds are issued. The FEIS states that AAF will mitigate adverse effects on historic properties by, among other things, implementing measures outlined in what was proposed in the FEIS as a draft Memorandum of Agreement (“MOA”) among FRA, AAF and SHPO. The PA replaces the inadequate draft MOA attached to the FEIS, and AAF’s compliance is clearly required with the PA in the event that private activity bonds are issued for the Project.

Requested changes consistent with this comment appear in the 4<sup>th</sup> and 5<sup>th</sup> Whereas clauses and Section I.A and I.B. of the attached redline.

2. **8<sup>th</sup> Whereas Clause and other locations throughout document**. The St. Sebastian River Bridge is incorrectly referred to as the Sebastian River Bridge.

Requested changes consistent with this comment appear in the attached redline.

3. **9<sup>th</sup> to 11<sup>th</sup> Whereas Clauses**. These clauses indicate that various determinations were made by the agencies “through consultation.” Indian River County has previously objected to the deficiencies in the Section 106 process for the AAF Project, and will not repeat them in these comments.

4. **13<sup>th</sup> Whereas Clause**. This clause describes the outreach conducted for the Project pursuant to NEPA, not Section 106. ACHP has stated that those NEPA scoping sessions did not satisfy or even initiate Section 106 consultation. *See* ACHP letters dated August 11, 2015 and October 23, 2015 (copies attached as Exhibit B). As written, this clause gives the inaccurate impression that issues relating to the Section 106 process were a significant focus of the meetings.

Requested changes consistent with this comment appear to the attached redline.

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5. **15<sup>th</sup> Whereas Clause.** Indian River County was omitted from the list of consulting parties in this clause. Indian River County, which is a political subdivision of the State of Florida organized under the laws thereof, is a separate entity from the Indian River County Historical Society, Inc. Indian River County submitted a letter to FRA dated June 10, 2015, indicating its intent to participate in the consultation, and should appear on the list of Consulting Parties. The County urges FRA, in consultation with ACHP, to review its files to be sure that other consulting parties have not been omitted from this list or otherwise excluded from participation in the consultation.

Requested changes consistent with this comment appear in the attached redline.

6. **16<sup>th</sup> to 18<sup>th</sup> Whereas Clause.** Please see Comment 3, above. Among the deficiencies raised in the County's previous objections to the Section 106 process were various deficiencies that precluded the County from effective participation in the consultation. Those objections will not be repeated in these comments.
7. **Section I.A.** Please see Comment 1, above.

Requested changes consistent with this comment appear in the attached redline.

8. **Section III.A.iii.** This section only provides 10 business days for a consulting party to decide whether to join the Bridges Advisory Group. For some consulting parties that are governmental entities, this is not adequate time to secure the authorizations necessary to participate, especially if it falls during a holiday or typical vacation-time period. The County requests that 30 calendar days be provided for consulting parties to respond.

Requested changes consistent with this comment appear in the attached redline.

9. **Section III.A.iii.** Recommendations from the Bridges Advisory Group should go to FRA as well as AAF.

Requested changes consistent with this comment appear in the attached redline.

10. **Section III.A.iv.** First, this section would have the Bridges Advisory Group review plans for proposed bridges once the plans were advanced to the 75% design stage. In order to provide meaningful input, the Bridges Advisory Group should review plans before they have advanced to final design. The County requests that preliminary plans at the 30% design stage be shared with the Bridges Advisory Group. If bridge plans already have advanced beyond the 30% design stage, these plans should be shared with the Bridges Advisory Group as soon as the group is formed.

In addition, this section only provides 10 business days for the Bridges Advisory Group to meet, review and provide comments on the proposed bridge plans. Given the number

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of parties likely to constitute the Bridges Advisory Group and the importance and complexity of the bridge designs, this is an unrealistic time period. The County requests that 60 calendar days be allowed for the Bridges Advisory Group to review and provide comments on proposed bridge plans.

The County understands that the recommendations are to be advisory only. However, FRA in consultation with SHPO and ACHP, should be authorized explicitly to require AAF to implement those economically and technically feasible recommendations that are: (i) in AAF's opinion consistent with engineering standards, and (ii) necessary to minimize effects on historic resources.

Requested changes consistent with these comments appear in the attached redline.

11. **Section III.B.ii., last bullet.** Indian River County was omitted from this paragraph but should receive this documentation in addition to the Indian River County Historical Society, Inc., which is a different entity than the County, as explained in Comment 5, above.

Requested changes consistent with this comment appear in the attached redline.

12. **Section IV.A.** This section references an "Archaeological Monitoring/Unanticipated Discoveries Plan," but a copy of that plan is not attached to the draft Programmatic Agreement, nor does it appear to have been reviewed by FRA, ACHP or the Consulting Parties. A draft archaeological monitoring plan was provided to the Consulting Parties in September 2015, in advance of the one Consulting Parties meeting. However, no revised plan has been circulated to the Consulting Parties. Due to the importance of this plan, it must be reviewed and approved by FRA, in consultation with SHPO and ACHP, and the Consulting Parties should have an opportunity to review and comment on it as well.

Requested changes consistent with this comment appear in the attached redline.

13. **Section IV.A.** The list of known sites and areas of archaeological sensitivity in this section omits the Campbell Site (8IR2) and the six Higher Probability Archaeological Sites the County identified in documentation submitted to FRA in advance of the consultation meeting by letter dated October 16, 2015 (copy attached as Exhibit C). These sites should receive the same protections as the other archaeologically sensitive sites under the Archaeological Monitoring/Unanticipated Discoveries Plan.

Requested changes consistent with this comment appear in the attached redline.

14. **Section IV.A. and Attachment 1, Table 8.** The known sites and areas of archaeological sensitivity listed in this Section IV.A should be used to augment Attachment 1, Table 8

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“Archeological Sites Located Within the N-S Corridor APE.” These two lists do not match in the draft PA and this oversight should be corrected.

15. **Section IV.B.** The appointment of an Independent Archaeological Monitor (“IAM”) is an excellent concept. However, in order for the IAM’s role to be meaningful, a mechanism must be included in the Programmatic Agreement to allow the IAM to raise concerns with the Project Archaeologist and FRA, and for FRA to issue a stop work order if appropriate. As currently written, the Programmatic Agreement does not provide any means for the IAM to immediately voice concerns other than through weekly status reports to FRA, nor does the Programmatic Agreement allow for any party other than the Project Archaeologist to determine that a significant resource is endangered or that work should halt until appropriate steps can be developed to deal with any such resource. This situation is of the utmost concern at areas near the Vero Man and Gifford Bones sites, which are immensely important archaeological resources.

Requested changes consistent with this comment appear in the attached redline.

16. **Section IV.B.i.** Selecting an archaeological monitor may not be an area of great expertise for FRA, a federal transportation agency. SHPO, on the other hand, is the entity within the State of Florida that should be most familiar with the qualifications of historic resources consultants. Accordingly, the County requests that SHPO prepare a list of acceptable candidates from which FRA may select the IAM.

Requested changes consistent with this comment appear in the attached redline.

17. **Section IV.B.ii.** As the Memorandum of Understanding will only be between FRA, AAF and the IAM, it should be made clear that it will be consistent with the PA.

Requested changes consistent with this comment appear in the attached redline.

18. **Section IV.C.i.** The County is concerned about the selection of Janus Research to serve as the Project Archeologist in light of the work performed by this consultant to date. Janus served as the historical resources consultant on the DEIS and prepared the original Cultural Resources Assessment Report, both of which omitted any reference to the archaeologically significant Vero Man site and the Gifford Bones site. Janus also assisted FRA and AAF with the Section 106 process for the Project, which was wholly deficient. Only after the Consulting Parties submitted numerous comments and requested ACHP to intervene, were the Vero Man and the Gifford Bones sites properly added into Project documentation. Since Janus did not recognize these sites as sufficiently important to merit protection under Section 106, it should not be assigned with primary responsibility for their protection during the course of construction.

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19. **Section IV.C.i.** Due to the importance of the archaeological monitors who will be working under the supervision of the Project Archeologist, the County recommends that a minimum level of training, educational and/or professional experience be required for individuals hired to perform this task. In addition, the County recommends that the Project Archeologist consult with the Independent Archaeological Monitor as to the appropriate number and placement of the monitors at each site.

Requested changes consistent with this comment appear in the attached redline.

20. **Sections IV.C.** The County requests that representatives from the Old Vero Ice Age Sites Committee (“OVIASC”) be permitted to serve as secondary independent archaeological monitors for all ground disturbing activities performed at the Vero Man site. Archaeologists working through OVIASC, including those from Mercyhurst University, the University of Florida, and Florida Atlantic University, have been working at the Vero Man site for years. This site, estimated to be over 14,000 years old, contains significant artifacts that support the theory that this area was important to a large number of extinct species and the Paleo-Indians that hunted them. Archaeologists working through OVIASC have unparalleled knowledge of this site and would greatly enhance the efficacy of the monitoring efforts.
21. **Section IV.C.vi., second bullet.** Seven calendar days is an inadequate time frame for the Consulting Parties to review and comment on appropriate treatment measures for newly discovered National-Register eligible archaeological resources. Any such resource will be significant and will require thoughtful evaluation by the Consulting Parties. A minimum of 30 calendar days should be provided for this review.

Requested changes consistent with this comment appear in the attached redline.

22. **Section IV.C.viii.** The Project Archeologist should present the results of the archeological monitoring to the IAM, AAF, FRA, SHPO, affected Native American Tribes and any Consulting Party requesting copies of such information.

Requested changes consistent with this comment appear in the attached redline.

23. **Section IV.D.ii.** This provision should make clear that following consultation between FRA and SHPO after a dispute between the Project Archeologist and the IAM, work will proceed only in accordance with the resolution of the consultation.

Requested changes consistent with this comment appear in the attached redline.

24. **Section V.C.** AAF should consult with SHPO, FRA and ACHP in the event it proposes to use private property outside of the existing APE for direct effects in order to locate and implement the new activities so as to limit the effects on archaeological and historic

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properties. The Consulting Parties must also be notified and given an opportunity to comment. This approach is consistent with the procedures outlined in the draft Programmatic Agreement.

Requested changes consistent with this comment appear in the attached redline.

25. **Section V.C.** It is unclear how the distance from archaeological sites will be measured if the site's boundary is unclear. The FEIS states that the boundaries for at least two significant archaeological resources are unknown or ambiguous. *See* FEIS pages 4-138 and 4-139, which underscores this point. The most conservative interpretation of a site's furthest boundaries should be employed in determining where alternative construction techniques must be utilized to avoid additional potential construction impacts.
26. **Section VII.** The County strongly believes that it is essential for the Consulting Parties to be kept abreast of developments during implementation of the Project. At an absolute minimum, a conference call to provide status reports should be held once a month with the Consulting Parties. If the Consulting Parties only receive status reports on a six month basis it is possible that they would only receive one or two such updates, assuming the Project were to be constructed in the short time period suggested by the FEIS.

Requested changes consistent with this comment appear in the attached redline.

27. **Section XII.** This section should provide that any amendments to the Programmatic Agreement will require consultation with the Consulting Parties before the amendment is executed. This is consistent with the approach to the development of the Programmatic Agreement in the first instance, and with Section 106.

Requested changes consistent with this comment appear in the attached redline.

**EXHIBIT A**

**U.S. Department of Transportation, “Provisional Bond Allocation Approval Letter”  
dated December 22, 2014.**

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U.S. Department of  
Transportation

Office of the Secretary  
of Transportation

Under Secretary of Transportation 1200 New Jersey Avenue SE  
Washington, DC 20590

December 22, 2014

## PROVISIONAL BOND ALLOCATION APPROVAL LETTER

Michael Reininger  
President and Chief Development Officer  
AAF Holdings LLC  
2855 Le Jeune Road  
4<sup>th</sup> Floor  
Coral Gables, FL 33134

Dear Mr. Reininger:

Thank you for your August 15, 2014 application for an allocation of private activity bond (PAB) authority for the All Aboard Florida project (the "Project").

The U.S. Department of Transportation (USDOT) has reviewed the application submitted by AAF Holdings LLC ("AAF") and applicable statutory and regulatory requirements, and I am pleased to inform you that USDOT is provisionally allocating up to \$1.75 billion of private activity bond authority to the Florida Development Finance Corporation, as requested in your application. The bonds are allocated for the Project described in the application with the conditions listed below.

First, a final bond counsel tax and validity opinion must be issued at the time of the closing of the bond issue in substantially the form provided with the application.

Second, the bonds must be issued by July 1, 2015. If the bonds have not been issued by that date, this provisional allocation automatically expires and the \$1.75 billion of PAB authority allocated for the Project will be available for reallocation to other eligible applicants. If this provisional allocation expires, you may resubmit an application and it will be reviewed without preference or priority being given as a result of its prior submission.

Third, any amount of unused bond allocation following an initial bond issuance will automatically return to USDOT's remaining aggregate amount of private activity bonds, and thus be available for other eligible applicants.

Fourth, the Federal Railroad Administration (FRA) is undertaking an environmental review of the Project under the National Environmental Policy Act (NEPA), in connection with All Aboard Florida - Operations LLC's ("Operations"), AAF's subsidiary, pending application

for a loan under the Railroad Rehabilitation and Improvement Financing (RRIF) program. FRA and Operations have entered into a Memorandum of Understanding (MOU) through which Operations has agreed, among other things, to retain a contractor to assist FRA in conducting the environmental review, to provide required environmental and related analyses, and to cover the cost of the environmental review. Regardless of whether Operations pursues the RRIF application following the receipt of this conditional PAB allocation, AAF agrees to cause Operations to fulfill the obligations described in the MOU to facilitate FRA's completion of the environmental review process.

Fifth, AAF or its subsidiary shall not use the bond proceeds until 45 days following the issuance of the Final Environmental Impact Statement (the "EIS"). Further, AAF or its subsidiary shall not use the bond proceeds on construction of a portion of the Project unless AAF or its subsidiaries have obtained any Federal, State, or local permits required by applicable law (subject to any preemption or exemption rights) for the construction of that portion of the Project.

Sixth, AAF agrees that if the bonds are issued for the development and construction of the Project, AAF shall cause its subsidiaries to complete and implement the measures specifically set forth in the EIS and any supplemental EIS (such as one needed to address changes in the scope of the Project) to avoid, minimize, or mitigate any adverse effects of the Project on the environment. AAF further agrees that service will not commence on a portion of the Project (such as the portion of the Project from Miami to West Palm Beach) until AAF certifies the completion or ongoing implementation, as applicable, of the measures with respect to such portion of the Project to USDOT in writing. USDOT will accept the certification in writing within 45 days of receipt or request additional information verifying compliance within that same timeframe.

Seventh, regardless of whether Operations obtains a RRIF loan, AAF agrees, by its execution of this letter, that if the bonds are issued for the development and construction of the Project, AAF shall cause Operations to fulfill the obligations described in that certain Commuter Railroad Service Agreement between Operations and South Florida Regional Transportation Authority (SFRTA) dated April 25, 2014.

Eighth, the private activity bond authority allocation granted to AAF is subject to the terms and conditions of this letter and applicable provisions of Federal law. In the event AAF fails to comply with these terms and conditions or applicable Federal law, USDOT reserves the right to pursue all available remedies, including the withdrawal of your private activity bond authority.

Lastly, this provisional allocation of PAB authority for the Project will have no impact on any future USDOT decision on an application for any USDOT credit assistance for this Project under USDOT credit programs, including any determination regarding project eligibility or project cost size and funding sources for any USDOT credit program. Any application for USDOT credit assistance for this Project will be evaluated under the governing statutes and regulations of that specific USDOT credit program.

The USDOT appreciates your interest in the private activity bond program and we look forward to the successful financing and delivery of your project. For additional information or questions, please contact Paul Baumer in the Office of Infrastructure Finance and Innovation at (202) 366-1092.

Sincerely yours,



Peter M. Rogoff

cc: Assistant Secretary for Budget & Programs, Office of the Secretary  
General Counsel, Office of the Secretary  
Administrator, Federal Highway Administration  
Administrator, Federal Railroad Administration  
Administrator, Federal Transit Administration

Accepted and Agreed to:

AAF Holdings LLC

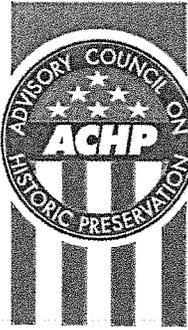
By: \_\_\_\_\_  
Michael Reininger  
President and Chief Development Officer

12/22/14  
Date

**EXHIBIT B**

**Advisory Council on Historic Protection, letters to the Federal Railroad Administration  
dated August 11, 2015 and October 23, 2015**

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Preserving America's Heritage

August 11, 2015

Mr. Michael Johnsen  
Federal Railroad Administration  
Supervisory Environmental Protection Specialist  
Office of Railroad Policy and Development  
1200 New Jersey Avenue, SE  
Washington, DC 20590

Ref: *Section 106 Coordination for the All Aboard Florida Project*

Dear Mr. Johnsen:

We appreciate the Federal Railroad Administration's (FRA's) participation in the conference call on July 30, 2015, with the Advisory Council on Historic Preservation (ACHP) to discuss the Section 106 review for the "All Aboard Florida" (AAF) Project. The call allowed us to review the status of the four-step Section 106 review process, and to clarify how FRA will coordinate with the consulting parties to identify and evaluate historic properties and to assess effects of the AAF Project on such properties. We also discussed how FRA would engage stakeholders recognized by the agency as consulting parties to review their concerns regarding the Section 106 review.

As you are aware, the ACHP received multiple inquiries from stakeholders with concerns about the Section 106 process for the AAF Project. In an attempt to respond to some of their concerns, we have had conversations with FRA staff and the stakeholders regarding project planning and the public comments received regarding AAF. In addition to recognizing stakeholders as consulting parties, we would like to discuss their Section 106 related concerns. While we realize, based on discussions with FRA and the Florida State Historic Preservation Office (SHPO) staff, that there have been numerous public meetings in planning AAF, these meetings were focused on scoping related to the National Environmental Policy Act (NEPA). Inasmuch as the focus of these meetings was not on historic properties, we question whether or not they constitute Section 106 consulting party meetings as defined in our regulations, "Protection of Historic Properties" (36 CFR Part 800). Section 800.2(4) of our regulations states that "the agency official shall plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement. FRA, therefore, should consider the geographic area in which the AAF Project was planned as well as the potential effects on historic properties as you engage consulting parties.

At this juncture, it would be helpful for FRA to share with consulting parties how it is completing the four-step Section 106 review process. By scheduling a consulting party meeting, FRA could provide a summary of the current status of the AAF Project that clarifies what future steps are planned and how and when the issues raised by consulting parties will be considered. Consulting parties have indicated that the lack of information on the status of Section 106 has been problematic.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637  
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

The NEPA information has not addressed the immediate or long term effects on historic properties, in particular. As such, discussions about compliance with Section 106 will allow us to work closely with FRA in determining appropriate steps to move forward with the AAF Project.

We look forward to hearing from FRA regarding the when and where it will convene the initial Section 106 consulting party meeting. Although our role in this matter is not clear, we feel it is important to formalize our decision to participate in consultation. We typically respond to agencies about our role after receiving an "Adverse Effect" notification. However, Section 800.2 (b)(1) of our regulations gives the ACHP the discretion to enter into the Section 106 review at any time to ensure that the purpose of Section 106 and the act are met. Accordingly, we intend to notify the Administrator of FRA soon of our intent to participate in the Section 106 consultation for the AAF Project.

If we can provide additional assistance in developing the meeting agenda or share with FRA examples of meeting protocols used for similar projects, please let us know. Further, if you have additional questions regarding next steps, please contact Christopher Wilson, Program Analyst, at (202) 517-0229, or via e-mail at [cwilson@achp.gov](mailto:cwilson@achp.gov). We look forward to hearing from you soon.

Sincerely,

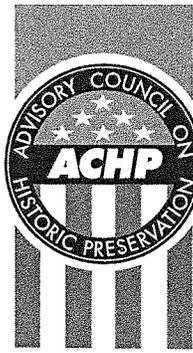


Charlene Dwin Vaughn, AICP

Assistant Director

Federal Permitting, Licensing and Assistance Section

Office of Federal Agency Programs



Preserving America's Heritage

October 23, 2015

Mr. David Valenstein  
Federal Railroad Administration  
Division Chief  
Office of Railroad Policy and Development  
1200 New Jersey Avenue, SE  
Washington, DC 20590

Ref: *All Aboard Florida*

Dear Mr. Valenstein:

We would like to extend our appreciation to the Federal Railroad Administration (FRA) for hosting the Section 106 consulting parties meeting on October 19<sup>th</sup> in Melbourne, Florida. We were pleased with the level of participation by consulting parties, including the Project Proponent, All Aboard Florida (AAF). The meeting facilitator was excellent as she allowed the consulting parties ample time to share their views and to identify perceived gaps in the coordination of the Section 106 review process.

FRA advised the consulting parties that it had completed Steps 1 – 3 of the four-step Section 106 process (§ 800.3 *Initiation of the process*, § 800.4 *Identification of historic properties*, § 800.5 *Assessment of adverse effects*, and § 800.6 *Resolution of adverse effects*). However, several of the consulting parties took exception to this conclusion, indicating that additional work was required to comply with the requirements of Section 106. FRA and AAF indicated that they held multiple public outreach meetings held during the scoping process required under the National Environmental Policy Act (NEPA). However, the NEPA scoping meetings as well as those held to discuss the Draft Environmental Impact Statement (DEIS) did not clarify how NEPA and the National Historic Preservation Act (NHPA) and its implementing regulations, “Protection of Historic Properties” (36 CFR Part 800), were aligned. Consulting parties specifically questioned why known archeological sites and other historic properties were excluded from the survey of the area of potential effects (APE). In addition, issues were raised about the development of the scope of work for the identification and evaluation within the APE, and the lack of involvement of consulting parties as Janus, the cultural resources consultant to AAF, prepared the list of properties listed on or eligible for listing in the National Register of Historic Places.

FRA recommended that consulting parties share with it the documented gaps in the identification and evaluation of properties within the undertaking’s APE. FRA also agreed that it would share this information with consulting parties and Janus to whether it was an oversight or unknown information. The Florida State Historic Preservation Officer (SHPO), who has spent an extended amount of staff time consulting in FRA and AAF on this undertaking, acknowledged that the Florida State Master Site File is a

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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database of historic properties over 50-years old that have not all been evaluated. As such, this document, which is incomplete and rather fluid, should be used for the initial phase of project surveys as further survey is required for archeological sites, and further evaluation of non-archeological resources. While AAF has done additional survey work within the APE, it did not address all information related to Counties and local governments. Therefore, many of the sites identified by the consulting parties may be unfamiliar to the SHPO. Since we have no evidence that AAF or Janus solicited this information from the affected Counties and Local Governments in Phase 2 of AAF, this information must be evaluated as it may be related to the Section 106 review. Only after the ACHP sees evidence of a good faith consultation in identifying and evaluating historic properties can we proceed to the resolution of adverse effects.

We subsequently met with several consulting parties on October 20<sup>th</sup> to hear their views on the status of the AAF project. At the outset, we heard that the execution of the MOA appeared to be premature. Likewise, questions were raised regarding the appropriateness of FRA developing a Memorandum of Agreement (MOA) under §800.6 (b) (IV) of our regulations rather than a Programmatic Agreement (PA) under §800.14(b). The MOA assumes that Step 2 and Step 3 of the Section 106 review have been completed and all the information on historic properties available to assist in decision-making. Unfortunately, they do not believe this is the case. As evidenced in the proposed Monitoring Plan for the MOA, additional work is anticipated as sites are discovered in the existing right-of-way of the Florida East Coast Railway. The PA could allow for phased identification and evaluation and assessment of effects, and can outline a process for concluding these reviews once private property is accessed. Further, the PA could incorporate relevant provisions from the archaeological monitoring plan which needs to be more robust for the archeological sites identified within the right of way of the existing rail lines. We also believe that the execution of a PA would be more appropriate as it would help AAF to better manage the implementation of this project and avoid delays that may result from impacts to human remains and complex archeological sites that may be discovered.

The community also expressed concern that they are not included in the mitigation plan developed to implement this undertaking. Specifically, they stated that their communities will be affected by project construction, traffic management, at-grade crossings, bridge replacement, etc., yet their views have not been considered. Over the years, the ACHP has seen community groups formally participate in the review of large scale corridor projects. These Advisory Groups are able to assist the project proponent by participating in post-agreement reviews, providing input on treatment of discoveries and unanticipated adverse effects on historic properties, and helping to develop context sensitive designs. They also are able to share their knowledge with the agency, SHPO, and ACHP regarding opportunities for creative mitigation measures. Accordingly, we urge FRA and AAF to consider how an Advisory Group comprised of representatives from the Counties and Local Government can participate in the mitigation measures negotiated for this undertaking.

In preparing your response to our recommendations, we also request that FRA address these additional questions:

1. Can Janus use local preservationists to help address identified gaps in the identification and evaluation of historic properties?
2. How can the information possessed by the Counties and Local Governments be used to augment the historic context for this area of Florida?
3. What type of interpretation is proposed for cultural resources identified in the APE for Phase 2 of the AAF?
4. How will Janus ensure that the scope of work for any additional survey and cultural resources work is adequate for this project?

We understand that FRA is eager to conclude the NEPA process, execute a Section 106 agreement document, and issue the Record of Decision (ROD). Although the project schedule was not shared during the October 19<sup>th</sup> meeting, we understand that AAF has a target date. Accordingly, we recommend that FRA consider our recommendations and respond to them and the above questions promptly. FRA and AAF can then schedule a call to discuss next steps to move the Section 106 review process forward.

In closing, we would like to thank FRA for agreeing to host the consultation meeting on October 19<sup>th</sup>. The meeting was productive for the ACHP as it allowed us to determine how we consult with FRA to manage the historic preservation issues. If you any questions regarding our comments, please contact Christopher Wilson, Program Analyst, at (202) 517-0229, or via e-mail at [cwilson@achp.gov](mailto:cwilson@achp.gov), or Charlene Dwin Vaughn, AICP, Assistant Director, OFAP, at (202)-517-0207, or via e-mail at [cvaughn@achp.gov](mailto:cvaughn@achp.gov).

Sincerely,



Reid Nelson  
Director  
Office of Federal Agency Programs

**EXHIBIT C**

**Indian River County letter to the Federal Railroad Administration dated October 16, 2015  
with Archaeological Report**

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# BOARD OF COUNTY COMMISSIONERS

## OFFICE OF COUNTY ATTORNEY

Dylan Reingold, County Attorney  
William K. DeBraal, Deputy County Attorney  
Kate Pingolt Cotner, Assistant County Attorney



*Via Email*

October 16, 2015

Mr. David Valenstein  
Mr. Michael Johnsen  
Federal Railroad Administration  
Office of Railroad Policy and Development  
1200 New Jersey Avenue, SE  
Washington, DC 20590  
[michael.johnsen@dot.gov](mailto:michael.johnsen@dot.gov)

**Re: All Aboard Florida Section 106 Consultation**

Dear Mr. Valenstein and Mr. Johnsen:

We look forward to meeting with you in the consultation session under Section 106 of the National Historic Preservation Act ("Section 106") for the proposed All Aboard Florida project ("AAF Project") scheduled for October 19, 2015. Among the issues we expect to raise at the meeting are the appropriate approaches under Section 106 for known and potential archaeological resources and known cultural resources in the area of potential effect ("APE") within and along the FEC corridor in Indian River County (the "County").

In preparation for the meeting, we are submitting herewith a report (the "Archaeological Report") prepared by Bob Carr of Archaeological and Historical Conservancy, Inc., which identifies the three previously recorded archeological sites in the County – the Vero Man Site (8IR11/8IR9), the Gifford Bones Site (8IR7/8IR8); and the Campbell Site (8IR2) – and six additional higher probability areas for archeological resources (identified as areas B, C, D, E, G and I in the Archaeological Report). *See Attachment A.* We understand that Mr. Carr will be attending the meeting and will be prepared to explain his methodology in preparing the report.

### **Vero Man Site (8IR1/8IR9)**

Both the Final Environmental Impact Statement ("FEIS") and the Revised Draft Determination of Effects for the AAF Project identify the Vero Man Site as a significant historic resource, and notes that portions of the site may lie beneath the proposed AAF Project corridor. *See Attachment B.* As you are aware, in its comments on the FEIS the County took issue with the assertion that construction and operation of the AAF Project would not cause damage to archaeological deposits at this immensely important site. *See Attachment C.* We did so in light of the nature and extent of the construction work proposed, and a concern that increased vibration resulting from faster freight

trains and additional passenger trains may damage fragile Vero Man Site artifacts adjacent to the rail corridor.

In order to resolve these concerns, the County believes that a Phase I Archaeological Assessment (a “Phase I Study”) should be conducted at: (i) the specific locations near the Vero Man site where any ground-disturbing activities associated with the AAF Project construction would take place; and (ii) areas adjoining the rail corridor that may be affected by increased vibration associated with post-construction freight and passenger rail operations. This investigation should be coordinated with the AAF Project construction schedule, to assure that it is completed before any ground disturbance begins.

In the event that resources are found in areas that would be affected by the AAF Project construction and operation, an archaeological management plan should be completed and implemented in consultation with the Florida State Historic Preservation Office (“SHPO”), AAF and other affected consulting parties. As and to the extent appropriate in light of the results of the Phase I Study, the plan should include additional archaeological documentation (through a Phase II and/or Phase III Archaeological Assessment), and/or monitoring, or avoidance.

**Other Known Resources: Campbell Site (8IR2) Gifford Bones Site (8IR7/8IR8) and Higher Probability Archeological Sites**

Like the Vero Man Site, the Campbell and Gifford Bones sites and the higher probability areas identified in the Archaeological Report present a situation where significant historic resources may lie beneath and adjacent to the proposed AAF Project corridor, but specific information regarding the location or depth of artifacts or fill is currently unavailable. *See Attachments D-F.* Accordingly, the County believes that Phase I Studies also should be conducted at locations near these sites that would be directly affected by ground-disturbing construction activities or lie in close proximity to the rail corridor and could be affected by vibration. If as a result of the Phase I Study it is determined that significant resources at a particular site may be affected by the AAF Project, an archaeological management plan should be completed and implemented in consultation with FSHPO, AAF and other consulting parties.

**Known Cultural Resources: Old Town Sebastian Historic District West (IR01048A), Old Town Sebastian Historic District East (IR01048B), Hallstrom Farmstead (8IR385), and a Number of Historical Homes (IR00095, IR00819, IR00823, IR00097 and IR00096)**

In addition to the above-referenced archeological resources, there are a number of cultural resources that are within the AAF Project’s APE and are neither identified in the Revised Draft Determination of Effects nor addressed in the draft Memorandum of Agreement (“MOA”). For example, Old Town Sebastian Historic District West (IR01048A) and Old Town Sebastian Historic District East (IR01048B) are separated by the Florida East Coast Railroad Corridor (“FEC Corridor”). *See Attachment G.* Moreover, both districts as well as at least five other properties which are listed on Florida’s Master Site File and are potentially eligible for the National Register fall within 250 feet from the centerline of the FEC Corridor– the APE suggested by SHPO in its comments to the Federal Railroad Administration’s Draft Environmental Impact Statement. *See Attachments H-J.* An assessment should be performed in the Section 106 review with respect to the referenced districts and properties to determine whether noise and vibration caused by the AAF Project would result in

an adverse effect to their defining characteristics, and appropriate mitigation should be developed and implemented to address any adverse effects that are thereby identified.

The Revised Draft Determination of Effects also ignores the Hallstrom Farmstead (8IR385). While the Hallstrom farm house is owned by the Indian River County Historical Society and is located just outside the APE, the County owns the surrounding 90+ acres and barns which make up the Hallstrom Farmstead and is potentially eligible for the National Register. *See Attachment K.* According to the Management Plan for the Hallstrom Farmstead Conservation Area which was created in 2002, the property is considered to be a historic vernacular landscape. This means that it provides a “scenic, economic, ecological, social, recreational and educational opportunity to help us understand ourselves as individuals, communities and as a nation.” *See Attachment L, page 21.* In fact, one of the purposes for the County acquiring the 90+ acres is to work in joint stewardship with the Indian River County Historical Society to offer interpretive and educational opportunities to school groups and the general public at least 24 times a year. *See Attachment L, page 7.* As such, the entire 90+ acres should be identified in the Revised Draft Determination of Effects as potentially eligible for the National Register, and the property should be properly analyzed for any noise and vibration impacts because portions fall within the AAF Project’s APE and it is an educational facility and museum where quiet is an important feature.

We hope it is useful for you to review this information in advance of the consultation meeting next week. We look forward to discussing it with you more fully at that time.

Sincerely,



Dylan Reingold  
County Attorney

Enclosures:

- Attachment A: Archaeological Report
- Attachment B: Map of Vero Man Site
- Attachment C: Indian River County’s Comments to the FEIS
- Attachment D: Map of Gifford Bones Site
- Attachment E: Archeological Site Form for Gifford Bones
- Attachment F: Map of Campbell Site
- Attachment G: Minutes from National Register Review Board Meeting -March 25-26, 2003
- Attachment H: Map of Old Town Sebastian Historical District East and West
- Attachment I: Map of Historical Sebastian District
- Attachment J: Comments submitted by SHPO
- Attachment K: Map of Hallstrom Farmstead
- Attachment L: Hallstrom Farmstead Management Plan

- cc: Tim Parsons, Florida SHPO (w/ enclosures)  
Charlene Dwin Vaughn, ACHP (w/ enclosures)  
Chris Wilson, AHCP (w/enclosures)  
Eugene Stearns, Council for AAF (w/enclosures)  
Matthew Buttrick, Council for AAF (w/enclosures)

# ATTACHMENT A

**The Identification of Higher Probability Areas for Archaeological Sites  
Along the FEC Railroad Corridor, Indian River County, Florida**

By

Robert S. Carr

Archaeological and Historical Conservancy, Inc.

AHC Technical Report #1082

2015.141  
October, 2015

## CONSULTANT SUMMARY

A review of aerial photographs and USGS maps of the AAF/FEC Railroad corridor within Indian River County indicated that a total of nine higher probability areas for archaeological sites occur within the AAF/FEC Railroad corridor APE (area of potential effect). The identification of higher probability areas is based on a site model created for Indian River County (Dickel 1992) and the author's expertise using aerial photographs and maps to identify potential archaeological sites.

The AAF/FEC Railroad corridor archaeological site model is based on the association of elevated uplands, particularly those of the Atlantic Coastal Ridge, abutting or in close proximity to wetland features such as rivers, creeks, sloughs, and ponds. This upland-wetland composite ecotone was an integral location for prehistoric subsistence, habitation, and transportation for Florida waterways that provided access to multiple environments associated with diverse resources and canoe routes.

The AAF/FEC Railroad corridor traverses the Atlantic Coastal Ridge, a major upland feature that has been the focus of prehistoric occupation for at least 12,000 years. The railroad corridor traverses the Vero Man and Gifford Bones sites, representing some of the earliest evidence of human occupation found in Florida. The Vero Man site is eligible for listing in the National Register of Historic Places, and the Gifford site is potentially eligible. At these sites the ridge was characterized by a remnant natural creek abutting and traversing a Paleo landscape, currently obscured and altered by modern development that has included the creation of Main Canal and other development-related activities such as bulldozing, dredging, and filling. In some cases these activities have not destroyed underlying cultural deposits, but covered them with fill, providing inadvertent protection to these sites; and in other cases archaeological and fossil materials may have been redeposited within the fill.

Currently, only sites 8IR1/8IR9, 8IR2, and 8IR7 (the Vero Man site, the Campbell Site, and the Gifford Bones sites) are identified as previously recorded sites along the FEC Railroad corridor, correlating to three of the higher probability areas. The prehistoric ecology of the Atlantic Coastal Ridge and its relation to archaeological sites is not fully understood, and other undetected sites obscured below more recent deposits likely occur. The other six archaeological probability areas have never been systematically tested by archaeologists and could include unknown archaeological sites. These higher probability areas need to be subject to Phase I assessments prior to proposed ground-disturbing activities.

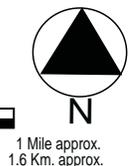
A compilation of relevant maps are presented including USGS maps and 1958 aerial photographs. The year 1958 was selected from available aerial photographs because the natural areas were discernible, facilitating identification of higher probability areas for archaeological sites. Each known site or untested high probability area is labeled A through I sequentially from north to south.



Figure 1. USGS Map of the Florida East Coast Railway corridor through Indian River County depicting higher archaeological probability areas, north to south.

-  = FLORIDA EAST COAST RAIL RIGHT-OF-WAY
-  = HIGHER ARCHAEOLOGICAL PROBABILITY AREA

USGS Maps: FELLSMERE, REV. 1992  
 SEBASTIAN, REV. 1970  
 VERO BEACH, REV. 1970



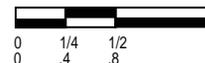
1 Mile approx.  
 1.6 Km. approx.



Figure 2. USGS Map of the Florida East Coast Railway corridor through Indian River County depicting higher archaeological probability areas, north to south.

-  = FLORIDA EAST COAST RAIL RIGHT-OF-WAY
-  = HIGHER ARCHAEOLOGICAL PROBABILITY AREA

USGS Maps: VERO BEACH, REV. 1970  
 RIOMAR, REV. 1992



1 Mile approx.  
 1.6 Km. approx.

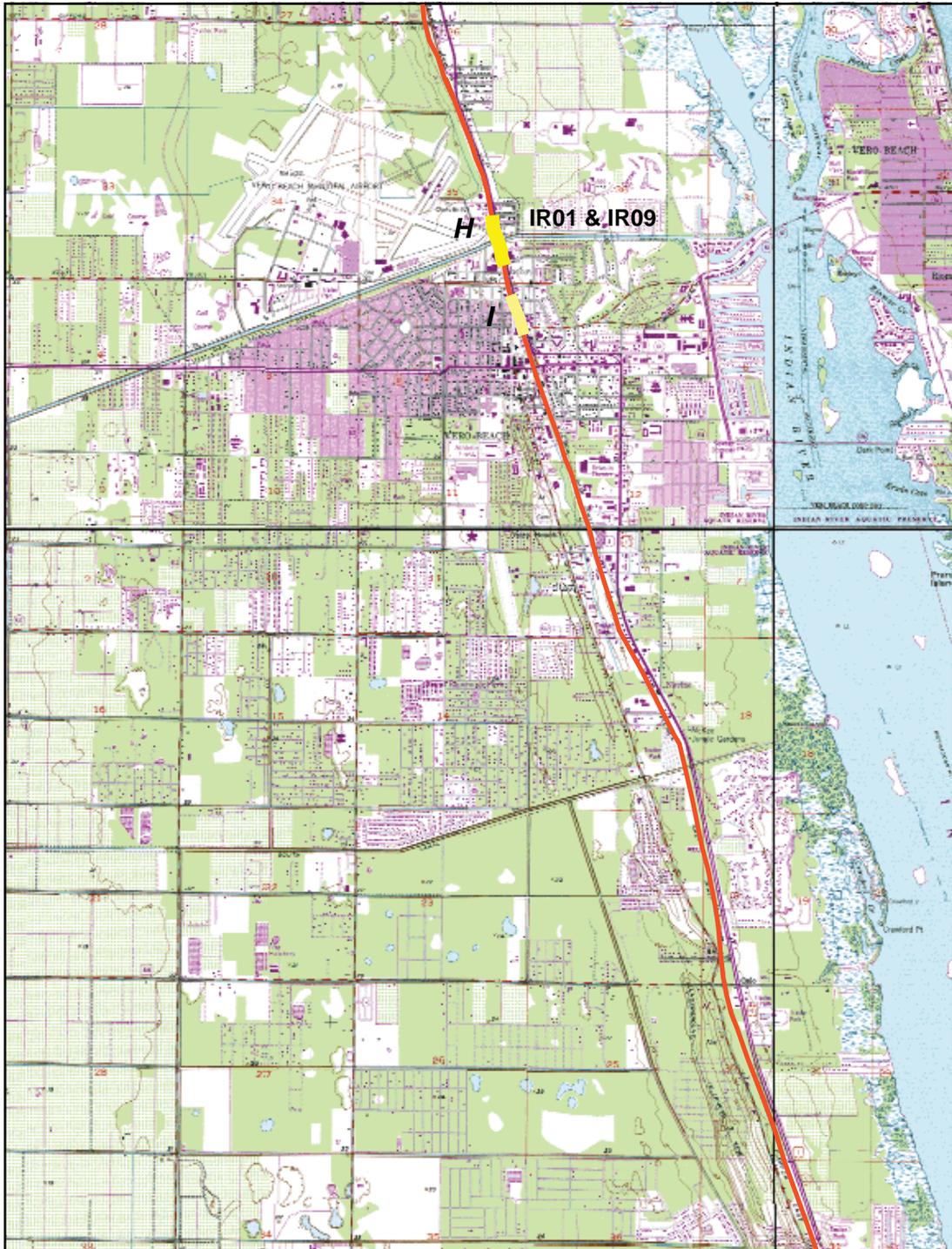


Figure 3. USGS Map of the Florida East Coast Railway corridor through Indian River County depicting higher archaeological probability areas, north to south.

-  = FLORIDA EAST COAST RAIL RIGHT-OF-WAY
-  = HIGHER ARCHAEOLOGICAL PROBABILITY AREA

USGS Maps: RIOMAR, REV. 1992  
OSLO, REV. 1983



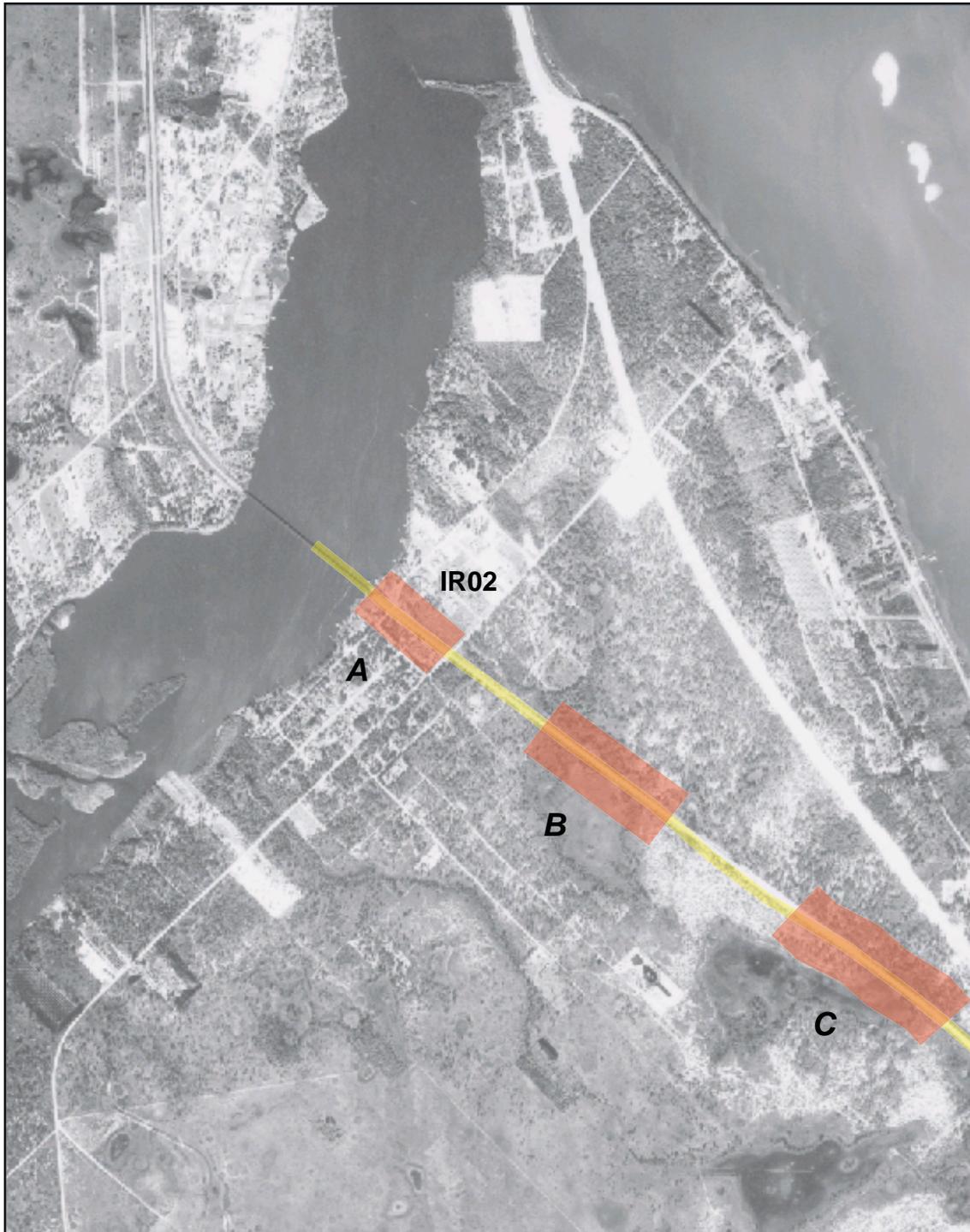


Figure 4. 1958 aerial photograph Florida East Coast Railway (FEC) corridor through Indian River County depicting archaeological probability areas, north to south.



= FEC RR CORRIDOR



= HIGHER ARCHAEOLOGICAL PROBABILITY AREA



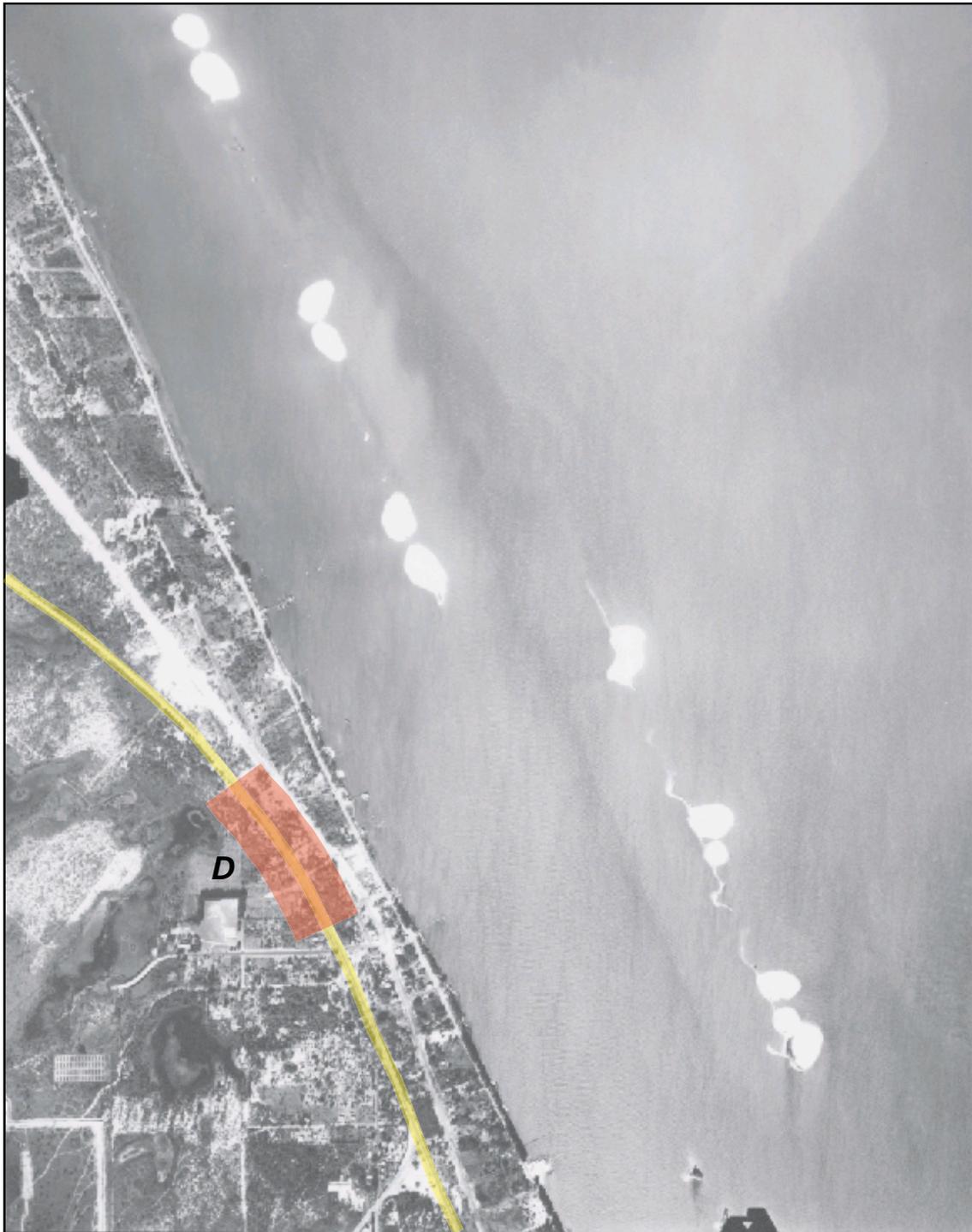
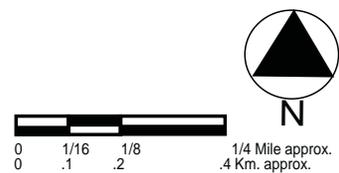


Figure 5. 1958 aerial photograph Florida East Coast Railway (FEC) corridor through Indian River County depicting archaeological probability areas, north to south.

 = FEC RR CORRIDOR  
 = HIGHER ARCHAEOLOGICAL PROBABILITY AREA



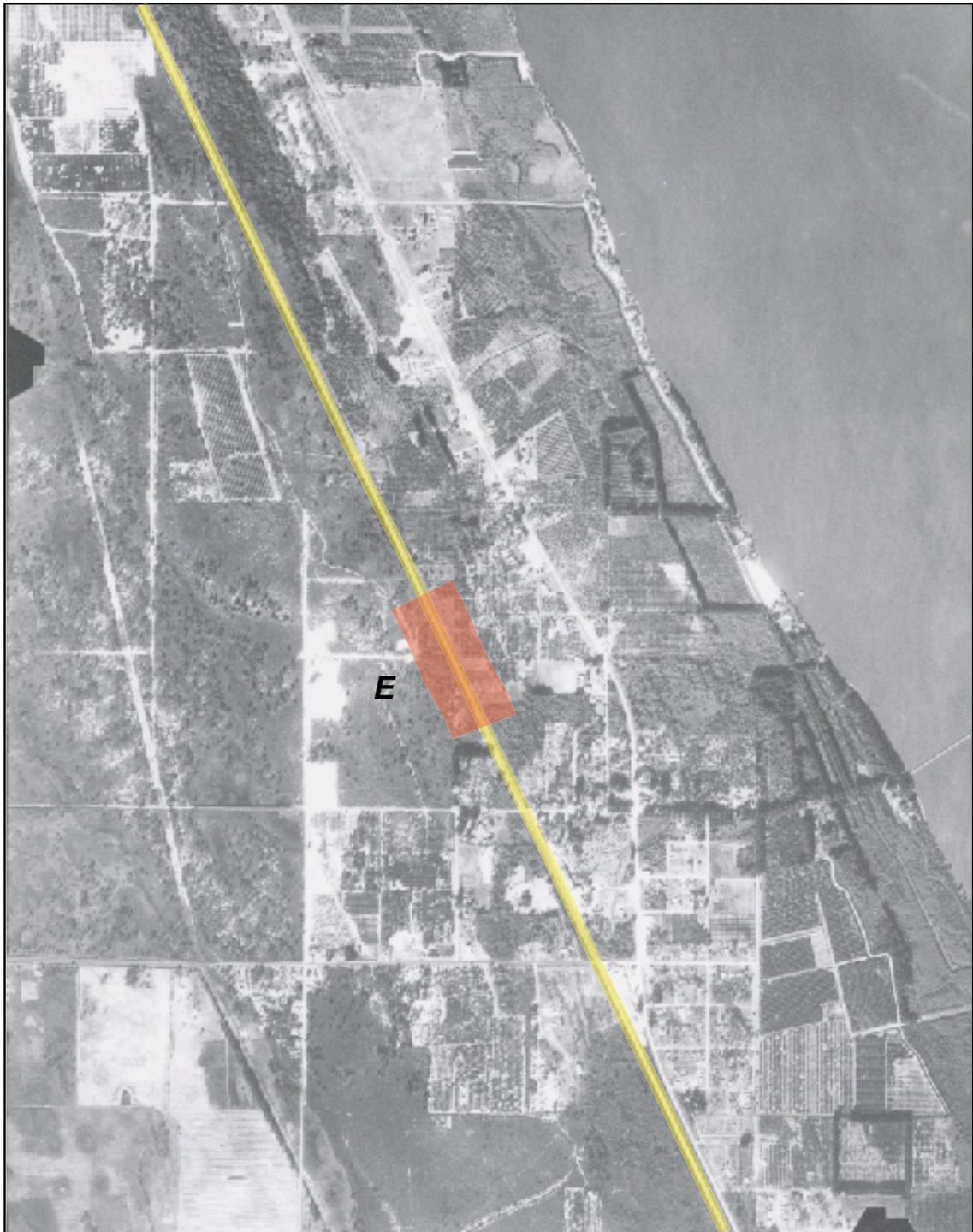


Figure 6. 1958 aerial photograph Florida East Coast Railway (FEC) corridor through Indian River County depicting archaeological probability areas, north to south.

 = FEC RR CORRIDOR  
 = HIGHER ARCHAEOLOGICAL PROBABILITY AREA

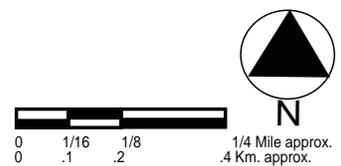




Figure 7. 1958 aerial photograph Florida East Coast Railway (FEC) corridor through Indian River County depicting archaeological probability areas, north to south.

-  = FEC RR CORRIDOR
-  = HIGHER ARCHAEOLOGICAL PROBABILITY AREA

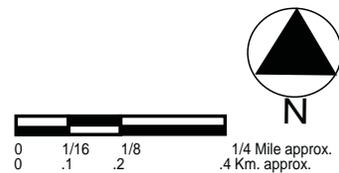
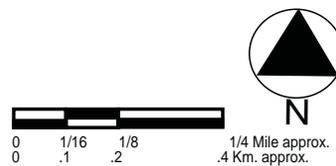




Figure 8. 1958 aerial photograph Florida East Coast Railway (FEC) corridor through Indian River County depicting archaeological probability areas, north to south.

-  = FEC RR CORRIDOR
-  = HIGHER ARCHAEOLOGICAL PROBABILITY AREA



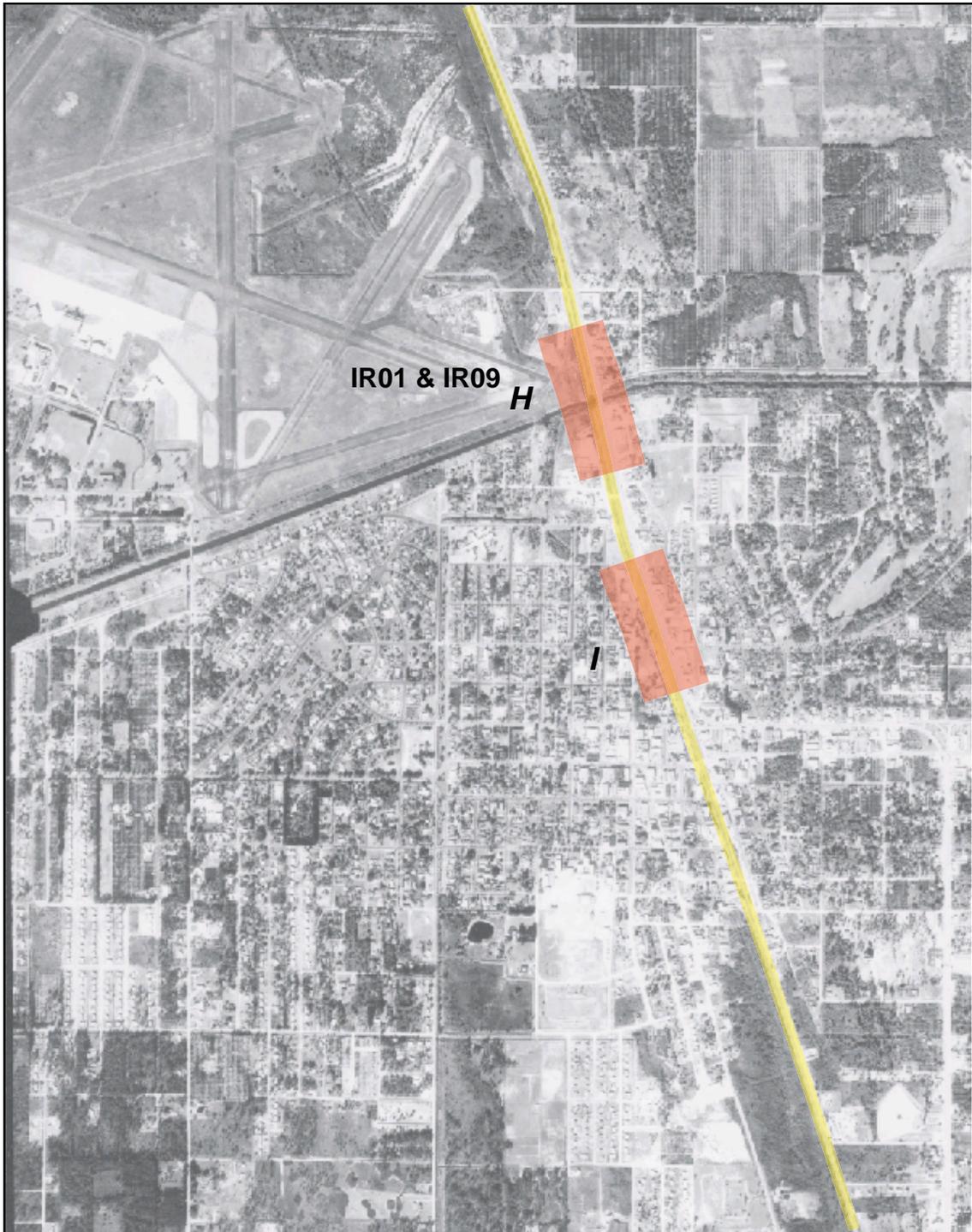


Figure 9. 1958 aerial photograph Florida East Coast Railway (FEC) corridor through Indian River County depicting archaeological probability areas, north to south.

 = FEC RR CORRIDOR

 = HIGHER ARCHAEOLOGICAL PROBABILITY AREA

