CODE OF FEDERAL REGULATIONS
TITLE 36PARKS, FORESTS, AND PUBLIC PROPERTY
CHAPTER INATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR
PART 60NATIONAL REGISTER OF HISTORIC PLACES

s 60.1 Authorization and expansion of the National Register.

(a) The National Historic Preservation Act of 1966, 80 Stat. 915, 16 U.S.C. 470 et seq., as amended, authorizes the Secretary of the Interior to expand and maintain a National Register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture. The regulations herein set forth the procedural requirements for listing properties on the National Register.

(b) Properties are added to the National Register through the following processes.

(1) Those Acts of Congress and Executive orders which create historic areas of the National Park System administered by the National Park Service, all or portions of which may be determined to be of historic significance consistent with the intent of Congress;

(2) Properties declared by the Secretary of the Interior to be of national significance and designated as National Historic Landmarks;

(3) Nominations prepared under approved State Historic Preservation Programs, submitted by the State Historic Preservation Officer and approved by the NPS;

(4) Nominations from any person or local government (only if such property is located in a State with no approved State Historic Preservation Program) approved by the NPS and;

(5) Nominations of Federal properties prepared by Federal agencies, submitted by the Federal Preservation Officer and approved by NPS.

s 60.2 Effects of listing under Federal law.

The National Register is an authoritative guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation's cultural resources and to indicate what properties should be considered for protection from destruction or impairment. Listing of private property on the National Register does not prohibit under Federal law or regulation any actions which may otherwise be taken by the property owner with respect to the property.

(a) The National Register was designed to be and is administered as a planning tool. Federal agencies undertaking a project having an effect on a listed or eligible property must provide the Advisory Council on Historic Preservation a reasonable opportunity to comment pursuant to section 106 of the National Historic Preservation Act of 1966, as amended. The Council has adopted procedures concerning, inter alia, their commenting responsibility in 36 CFR Part 800. Having complied with this procedural requirement the Federal agency may adopt any course of action it believes is appropriate. While the Advisory Council comments must be taken into account and integrated into the decisionmaking process, program decisions rest with the agency implementing the undertaking.

(b) Listing in the National Register also makes property owners eligible to be considered for Federal grants-inaid for historic preservation.

(c) If a property is listed in the National Register, certain provisions of the Tax Reform Act of 1976 as amended by the Revenue Act of 1978 and the Tax Treatment Extension Act of 1980 may apply. These provisions encourage the preservation of depreciable historic structures by allowing favorable tax treatments for rehabilitation, and discourage destruction of historic buildings by eliminating certain otherwise available Federal tax provisions both for demolition of historic structures and for new construction on the site of demolished historic buildings. Owners of historic buildings may benefit from the investment tax credit provisions of the Revenue Act of 1978. The Economic Recovery Tax Act of 1981 generally replaces the rehabilitation tax incentives under these laws beginning January 1, 1982 with a 25% investment tax credit for rehabilitations of historic commercial, industrial and residential buildings. This can be combined with a 15year cost recovery period for the adjusted basis of the historic building. Historic buildings with certified rehabilitations receive additional tax savings by their exemption from any requirement to reduce the basis of the building by the amount of the credit. The denial of accelerated depreciation for a building built on the site of a demolished historic building is repealed effective January 1, 1982. The Tax Treatment Extension Act of 1980 includes provisions regarding charitable contributions for conservation purposes of partial interests in historically important land areas or structures.

(d) If a property contains surface coal resources and is listed in the National Register, certain provisions of the Surface Mining and Control Act of 1977 require consideration of a property's historic values in the determination on issuance of a surface coal mining permit.

s 60.3 Definitions.

(a) Building. A building is a structure created to shelter any form of human activity, such as a house, barn, church, hotel, or similar structure. Building may refer to a historically related complex such as a courthouse and jail or a house and barn.

Examples

Molly Brown House (Denver, CO)
Meek Mansion and Carriage House (Hayward, CA)
Huron County Courthouse and Jail (Norwalk, OH)
Fairntosh Plantation (Durham vicinity, NC)

(b) Chief elected local official. Chief elected local official means the mayor, county judge, county executive or otherwise titled chief elected administrative official who is the elected head of the local political jurisdiction in which the property is located.

(c) Determination of eligibility. A determination of eligibility is a decision by the Department of the Interior that a district, site, building, structure or object meets the National Register criteria for evaluation although the property is not formally listed in the National Register. A determination of eligibility does not make the property eligible for such benefits as grants, loans, or tax incentives that have listing on the National Register as a prerequisite.

(d) District. A district is a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history.

Examples

Georgetown Historic District (Washington, DC)
Martin Luther King Historic District (Atlanta, GA)
DurangoSilverton NarrowGauge Railroad (rightofway between Durango and Silverton, CO)

(e) Federal Preservation Officer. The Federal Preservation Officer is the official designated by the head of each Federal agency responsible for coordinating that agency's activities under the National Historic Preservation Act of 1966, as amended, and Executive Order 11593 including nominating properties under that agency's ownership or control to the National Register.

(f) Keeper of the National Register of Historic Places. The Keeper is the individual who has been delegated the authority by NPS to list properties and determine their eligibility for the National Register. The Keeper may further delegate this authority as he or she deems appropriate.

(g) Multiple Resource Format submission. A Multiple Resource Format submission for nominating properties to the National Register is one which includes all or a defined portion of the cultural resources identified in a specified geographical area.

(h) National Park Service (NPS). The National Park Service is the bureau of the Department of Interior to which the Secretary of Interior has delegated the authority and responsibility for administering the National Register program.

(i) National Register Nomination Form. National Register Nomination Form means (1) National Register Nomination Form NPS 10900, with accompanying continuation sheets (where necessary) Form NPS 10-900a, maps and photographs or (2) for Federal nominations, Form No. 10306, with continuation sheets (where necessary) Form No. 10300A, maps and photographs. Such nomination forms must be "adequately documented" and "technically and professionally correct and sufficient." To meet these requirements the forms and accompanying maps and photographs must be completed in accord with requirements and guidance in the NPS publication, "How to Complete National Register Forms" and other NPS technical publications on this subject. Descriptions and statements of significance must be prepared in accord with standards generally accepted by academic historians, architectural historians and archeologists. The nomination form is a legal document and reference for historical, architectural, and archeological data upon which the protections for listed and eligible properties are founded. The nominating authority certifies that the nomination is adequately documented and technically and professionally correct and sufficient upon nomination.

(j) Object. An object is a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.

Examples

Delta Queen Steamboat (Cincinnati, OH)
Adams Memorial (Rock Creek Cemetery, Washington, DC)
Sumpter Valley Gold Dredge (Sumpter, OR)

(k) Owner or owners. The term owner or owners means those individuals, partnerships, corporations or public agencies holding fee simple title to property. Owner or owners does not include individuals, partnerships, corporations or public agencies holding easements or less than fee interests (including leaseholds) of any nature.

(l) Site. A site is the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself maintains historical or archeological value regardless of the value of any existing structure.

Examples

Cabin Creek Battlefield (Pensacola vicinity, OK)
Mound Cemetery Mound (Chester vicinity, OH)
Mud Springs Pony Express Station Site (Dalton vicinity, NE)

(m) State Historic Preservation Officer. The State Historic Preservation Officer is the person who has been designated by the Governor or chief executive or by State statute in each State to administer the State Historic Preservation Program, including identifying and nominating eligible properties to the National Register and otherwise administering applications for listing historic properties in the National Register.

(n) State Historic Preservation Program. The State Historic Preservation Program is the program established by each State and approved by the Secretary of Interior for the purpose of carrying out the provisions of the National Historic Preservation Act of 1966, as amended, and related laws and regulations. Such program shall be approved by the Secretary before the State may nominate properties to the National Register. Any State Historic Preservation Program in effect under prior authority of law before
December 12, 1980, shall be treated as an approved program until the Secretary approves a program submitted by the State for purposes of the Amendments or December 12, 1983, unless the Secretary chooses to rescind such approval because of program deficiencies.

(o) State Review Board. The State Review Board is a body whose members represent the professional fields of American history, architectural history, historic architecture, prehistoric and historic archeology, and other professional disciplines and may include citizen members. In States with approved State historic preservation programs the State Review Board reviews and approves National Register nominations concerning whether or not they meet the criteria for evaluation prior to their submittal to the NPS.

(p) Structure. A structure is a work made up of interdependent and interrelated parts in a definite pattern of organization. Constructed by man, it is often an engineering project large in scale.

Examples

Swanton Covered Railroad Bridge (Swanton vicinity, VT)
Old Point Loma Lighthouse (San Diego, CA)
North Point Water Tower (Milwaukee, WI)
Reber Radio Telescope (Green Bay vicinity, WI)

(q) Thematic Group Format submission. A Thematic Group Format submission for nominating properties to the National Register is one which includes a finite group of resources related to one another in a clearly distinguishable way. They may be related to a single historic person, event, or developmental force; of one building type or use, or designed by a single architect; of a single archeological site form, or related to a particular set of archeological research problems.

(r) To nominate. To nominate is to propose that a district, site, building, structure, or object be listed in the National Register of Historic Places by preparing a nomination form, with accompanying maps and photographs which adequately document the property and are technically and professionally correct and sufficient.

s 60.4 Criteria for evaluation.

The criteria applied to evaluate properties (other than areas of the National Park System and National Historic Landmarks) for the National Register are listed below. These criteria are worded in a manner to provide for a wide diversity of resources. The following criteria shall be used in evaluating properties for nomination to the National Register, by NPS in reviewing nominations, and for evaluating National Register eligibility of properties. Guidance in applying the criteria is further discussed in the "How To" publications, Standards & Guidelines sheets and Keeper's opinions of the National Register. Such materials as available upon request.
National Register criteria for evaluation. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

Criteria considerations. Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria of if they fall within the following categories:

(a) A religious property deriving primary significance from architectural or artistic distinction or historical importance; or

(b) A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or

(c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life.

(d) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or

(e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or

(f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or

(g) A property achieving significance within the past 50 years if it is of exceptional importance.

This exception is described further in NPS "How To" #2, entitled "How to Evaluate and Nominate Potential National Register Properties That Have Achieved Significance Within the Last 50 Years" which is available from the National Register of Historic Places Division, National Park Service, United States Department of the Interior, Washington, D.C. 20240.

s 60.5 Nomination forms and information collection.

(a) All nominations to the National Register are to be made on standard National Register forms. These forms are provided upon request to the State Historic Preservation Officer, participating Federal agencies and others by the NPS. For archival reasons, no other forms, photocopied or otherwise, will be accepted.

(b) The information collection requirements contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 10240018. The information is being collected as part of the nomination of properties to the National Register. This information will be used to evaluate the eligibility of properties for inclusion in the National Register under established criteria. The obligation to respond is required to obtain a benefit.

s 60.6 Nominations by the State Historic Preservation Officer under approved State Historic Preservation programs.

(a) The State Historic Preservation Officer is responsible for identifying and nominating eligible properties to the National Register. Nomination forms are prepared under the supervision of the State Historic Preservation Officer. The State Historic Preservation Officer establishes statewide priorities for preparation and submittal of nominations for all properties meeting National Register criteria for evaluation within the State. All nominations from the State shall be submitted in accord with the State priorities, which shall be consistent with an approved State historic preservation plan.

(b) The State shall consult with local authorities in the nomination process. The State provides notice of the intent to nominate a property and solicits written comments especially on the significance of the property and whether or not in meets the National Register criteria for evaluation. The State notice also gives owners of private property an opportunity to concur in or object to listing. The notice is carried out as specified in the subsections below.

(c) As part of the nomination process, each State is required to notify in writing the property owner(s), except as specified in paragraph (d) of this section, of the State's intent to bring the nomination before the State Review Board. The list of owners shall be obtained from either official land recordation records or tax records, whichever is more appropriate, within 90 days prior to the notification of intent to nominate. If in any State the land recordation or tax records is not the most appropriate list from which to obtain owners that State shall notify the Keeper in writing and request approval that an alternative source of owners may be used.

The State is responsible for notifying only those owners whose names appear on the list consulted. Where there is more than one owner on the list, each separate owner shall be notified. The State shall send the written notification at least 30 but not more than 75 days before the State Review Board meeting. Required notices may vary in some details of wording as the States prefer, but the content of notices must be approved by the National Register. The notice shall give the owner(s) at least 30 but not more than 75 days to submit written comments and concur in or object in writing to the nomination of such property. At least 30 but not more than 75 days before the State Review Board meeting, the States are also required to notify by the above mentioned National Register approved notice the applicable chief elected official of the county (or equivalent governmental unit) and municipal political jurisdiction in which the property is located. The National Register nomination shall be on file with the State Historic Preservation Program during the

comment period and a copy made available by mail when requested by the public, or made available at a location of reasonable access to all affected property owners, such as a local library courthouse, or other public place, prior to the State Review Board meeting so that written comments regarding the nomination can be prepared.

(d) For a nomination with more than 50 property owners, each State is required to notify in writing at least 30 but not more than 75 days in advance of the State Review Board meeting the chief elected local officials of the county (or equivalent governmental unit) and municipal political jurisdiction in which the property or district is located. The State shall provide general notice to property owners concerning the State's intent to nominate. The general notice shall be published at least 30 days but not more than 75 days before the State Review Board meeting and provide an opportunity for the submission of written comments and provide the owners of private property or a majority of such owners for districts an opportunity to concur in or object in writing to the nomination. Such general notice must be published in one or more local newspapers of general circulation in the area of the nomination. The content of the notices shall be approved by the National Register. If such general notice is used to notify the property owners for a nomination containing more than 50 owners, it is suggested that a public information meeting be held in the immediate area prior to the State Review Board meeting. If the State wishes to individually notify all property owners, it may do so, pursuant to procedures specified in Subsection 60.6(c), in which case, the State need not publish a general notice.

(e) For Multiple Resource and Thematic Group Format submission, each district, site, building, structure and object included in the submission is treated as a separate nomination for the purpose of notification and to provide owners of private property the opportunity to concur in or object in writing to the nomination in accord with this section.

(f) The commenting period following notifications can be waived only when all property owners and the chief elected local official have advised the State in writing that they agree to the waiver.

(g) Upon notification, any owner or owners of a private property who wish to object shall submit to the State Historic Preservation Officer a notarized statement certifying that the party is the sole or partial owner of the private property, as appropriate, and objects to the listing. In nominations with multiple ownership of a single private property or of districts, the property will not be listed if a majority of the owners object to listing. Upon receipt of notarized objections respecting a district or single private property with multiple owners, it is the responsibility of the State Historic Preservation Officer to ascertain whether a majority of owners of private property have objected. If an owner whose name did not appear on the list certifies in a written notarized statement that the party is the sole or partial owner of a nominated private property such owner shall be counted by the State Historic Preservation Officer in determining whether a majority of owners has objected. Each owner of private property in a district has one vote regardless of how many properties or what part of one property that party owns and regardless of whether the property contributes to the significance of the district.

(h) If a property has been submitted to and approved by the State Review Board for inclusion in the National Register prior to the effective date of this section, the State Historic Preservation Officer need not resubmit the property to the State Review Board; but before submitting the nomination to the NPS shall afford owners of private property the opportunity to concur in or object to the property's inclusion in the Register pursuant to applicable notification procedures described above.

(i) [Reserved]

(j) Completed nomination forms or the documentation proposed for submission on the nomination forms and comments concerning the significance of a property and its eligibility for the National Register are submitted

to the State Review Board. The State Review Board shall review the nomination forms or documentation proposed for submission on the nomination forms and any comments concerning the property's significance and eligibility for the National Register. The State Review Board shall determine whether or not the property meets the National Register criteria for evaluation and make a recommendation to the State Historic Preservation Officer to approve or disapprove the nomination.

(k) Nominations approved by the State Review Board and comments received are then reviewed by the State Historic Preservation Officer and if he or she finds the nominations to be adequately documented and technically, professionally, and procedurally correct and sufficient and in conformance with National Register criteria for evaluation, the nominations are submitted to the Keeper of the National Register of Historic Places, National Park Service, United States Department of the Interior, Washington, D.C. 20240. All comments received by a State and notarized statements of objection to listing are submitted with a nomination.

(l) If the State Historic Preservation Officer and the State Review Board disagree on whether a property meets the National Register criteria for evaluation, the State Historic Preservation Officer, if he or she chooses, may submit the nomination with his or her opinion concerning whether or not the property meets the criteria for evaluation and the opinion of the State Review Board to the Keeper of the National Register for a final decision on the listing of the property. The opinion of the State Review Board may be the minutes of the Review Board meeting. The State Historic Preservation Officer shall submit such disputed nominations if so requested within 45 days of the State Review Board meeting by the State Review Board or the chief elected local official of the local, county or municipal political subdivision in which the property is located but need not otherwise do so. Such nominations will be substantively reviewed by the Keeper.

(m) The State Historic Preservation Officer shall also submit to the Keeper nominations if so requested under the appeals process in s 60.12.

(n) If the owner of a private property or the majority of such owners for a district or single property with multiple owners have objected to the nomination prior to the submittal of a nomination, the State Historic Preservation Officer shall submit the nomination to the Keeper only for a determination of eligibility pursuant to subsection (s) of this section.

(o) The State Historic Preservation Officer signs block 12 of the nomination form if in his or her opinion the property meets the National Register criteria for evaluation. The State Historic Preservation Officer's signature in block 12 certifies that:

(1) All procedural requirements have been met;

(2) The nomination form is adequately documented;

(3) The nomination form is technically and professionally correct and sufficient;

(4) In the opinion of the State Historic Preservation Officer, the property meets the National Register criteria for evaluation.

(p) When a State Historic Preservation Officer submits a nomination form for a property that he or she does not believe meets the National Register criteria for evaluation, the State Historic Preservation Officer signs a continuation sheet Form NPS 10900a explaining his/her opinions on the eligibility of the property and certifying that:

(1) All procedural requirements have been met;

(2) The nomination form is adequately documented;

(3) The nomination form is technically and professionally correct and sufficient.

(q) Notice will be provided in the FEDERAL REGISTER that the nominated property is being considered for listing in the National Register of Historic Places as specified in s 60.13.

(r) Nominations will be included in the National Register within 45 days of receipt by the Keeper or designee unless the Keeper disapproves a nomination, an appeal is filed, or the owner of private property (or the majority of such owners for a district or single property with multiple owners) objects by notarized statements received by the Keeper prior to listing. Nominations which are technically or professionally inadequate will be returned for correction and resubmission. When a property does not appear to meet the National Register criteria for evaluation, the nomination will be returned with an explanation as to why the property does not meet the National Register criteria for evaluation.

(s) If the owner of private property (or the majority of such owners for a district or single property with multiple owners) has objected to the nomination by notarized statement prior to listing, the Keeper shall review the nomination and make a determination of eligibility within 45 days of receipt, unless an appeal is filed. The Keeper shall list such properties determined eligible in the National Register upon receipt of notarized statements from the owner(s) of private property that the owner(s) no longer object to listing.

(t) Any person or organization which supports or opposes the nomination of a property by a State Historic Preservation Officer may petition the Keeper during the nomination process either to accept or reject a nomination. The petitioner must state the grounds of the petition and request in writing that the Keeper substantively review the nomination. Such petitions received by the Keeper prior to the listing of a property in the National Register or a determination of its eligibility where the private owners object to listing will be considered by the Keeper and the nomination will be substantively reviewed.

(u) State Historic Preservation Officers are required to inform the property owners and the chief elected local official when properties are listed in the National Register. In the case of a nomination where there are more than 50 property owners, they may be notified of the entry in the National Register by the same general notice stated in s 60.6(d). States which notify all property owners individually of entries in the National Register need not publish a general notice.

(v) In the case of nominations where the owner of private property (or the majority of such owners for a district or single property with multiple owners) has objected and the Keeper has determined the nomination eligible for the National Register, the State Historic Preservation Officer shall notify the appropriate chief elected local official and the owner(s) of such property of this determination. The general notice may be used for properties with more than 50 owners as described in s 60.6(d) or the State Historic Preservation Officer may notify the owners individually.

(w) If subsequent to nomination a State makes major revisions to a nomination or renominates a property rejected by the Keeper, the State Historic Preservation Officer shall notify the affected property owner(s) and the chief elected local official of the revisions or renomination in the same manner as the original notification for the nomination, but need not resubmit the nomination to the State Review Board. Comments received and notarized statements of objection must be forwarded to the Keeper along with the revisions or renomination. The State Historic Preservation Officer also certifies by the resubmittal that the affected property owner(s) and the chief elected local official have been renotified. "Major revisions" as used herein means revisions of boundaries or important substantive revisions to the nomination which could be expected to change the ultimate outcome as to whether or not the property is listed in the National Register by the

Keeper.

(x) Notwithstanding any provision hereof to the contrary, the State Historic Preservation Officer in the nomination notification process or otherwise need not make available to any person or entity (except a Federal agency planning a project, the property owner, the chief elected local official of the political jurisdiction in which the property is located, and the local historic preservation commission for certified local governments) specific information relating to the location of properties proposed to be nominated to, or listed in, the National Register if he or she determines that the disclosure of specific information would create a risk of destruction or harm to such properties.

(y) With regard to property under Federal ownership or control, completed nomination forms shall be submitted to the Federal Preservation Officer for review and comment. The Federal Preservation Officer, may approve the nomination and forward it to the Keeper of the National Register of Historic Places, National Park Service, United States Department of the Interior, Washington, D.C. 20240.

ss 60.7 to 60.8 [Reserved]

s 60.9 Nominations by Federal agencies.

(a) The National Historic Preservation Act of 1966, as amended, requires that, with the advice of the Secretary and in cooperation with the State Historic Preservation Officer of the State involved, each Federal agency shall establish a program to locate, inventory and nominate to the Secretary all properties under the agency's ownership or control that appear to qualify for inclusion on the National Register. Section 2(a) of Executive Order 11593 provides that Federal agencies shall locate, inventory, and nominate to the Secretary of the Interior all sites, buildings, districts, and objects under their jurisdiction or control that appear to qualify for listing on the National Register of Historic Places. Additional responsibilities of Federal agencies are detailed in the National Historic Preservation Act of 1966, as amended, Executive Order 11593, the National Environmental Policy Act of 1969, the Archeological and Historic Preservation Act of 1974, and procedures developed pursuant to these authorities, and other related legislation.

(b) Nomination forms are prepared under the supervision of the Federal Preservation Officer designated by the head of a Federal agency to fulfill agency responsibilities under the National Historic Preservation Act of 1966, as amended.

(c) Completed nominations are submitted to the appropriate State Historic Preservation Officer for review and comment regarding the adequacy of the nomination, the significance of the property and its eligibility for the National Register. The chief elected local officials of the county (or equivalent governmental unit) and municipal political jurisdiction in which the property is located are notified and given 45 days in which to comment. The State Historic Preservation Officer signs block 12 of the nomination form with his/her recommendation.

(d) After receiving the comments of the State Historic Preservation Officer, and chief elected local official, or if there has been no response within 45 days, the Federal Preservation Officer may approve the nomination and forward it to the Keeper of the National Register of Historic Places, National Park Service, United States Department of the Interior, Washington, D.C. 20240. The Federal Preservation Officer signs block 12 of the nomination form if in his or her opinion the property meets the National Register criteria for evaluation. The Federal Preservation Officer's signature in block 12 certifies that:

(1) All procedural requirements have been met;

(2) The nomination form is adequately documented;

(3) The nomination form is technically and professionally correct and sufficient;

(4) In the opinion of the Federal Preservation Officer, the property meets the National Register criteria for evaluation.

(e) When a Federal Preservation Officer submits a nomination form for a property that he or she does not believe meets the National Register criteria for evaluation, the Federal Preservation Officer signs a continuation sheet Form NPS 10900a explaining his/her opinions on the eligibility of the property and certifying that:

(1) All procedural requirements have been met;

(2) The nomination form is adequately documented;

(3) The nomination form is technically and professionally correct and sufficient.

(f) The comments of the State Historic Preservation Officer and chief local official are appended to the nomination, or, if there are no comments from the State Historic Preservation Officer an explanation is attached. Concurrent nominations (see s 60.10) cannot be submitted, however, until the nomination has been considered by the State in accord with Sec. 60.6, supra. Comments received by the State concerning concurrent nominations and notarized statements of objection must be submitted with the nomination.

(g) Notice will be provided in the FEDERAL REGISTER that the nominated property is being considered for listing in the National Register of Historic Places in accord with s 60.13.

(h) Nominations will be included in the National Register within 45 days of receipt by the Keeper or designee unless the Keeper disapproves such nomination or an appeal is filed. Nominations which are technically or professionally inadequate will be returned for correction and resubmission. When a property does not appear to meet the National Register criteria for evaluation, the nomination will be returned with an explanation as to why the property does not meet the National Register criteria for evaluation.

(i) Any person or organization which supports or opposes the nomination of a property by a Federal Preservation Officer may petition the Keeper during the nomination process either to accept or reject a nomination. The petitioner must state the grounds of the petition and request in writing that the Keeper substantively review the nomination. Such petition received by the Keeper prior to the listing of a property in the National Register or a determination of its eligibility where the private owner(s) object to listing will be considered by the Keeper and the nomination will be substantively reviewed.

s 60.10 Concurrent State and Federal nominations.

(a) State Historic Preservation Officers and Federal Preservation Officers are encouraged to cooperate in locating, inventorying, evaluating, and nominating all properties possessing historical, architectural, archeological, or cultural value. Federal agencies may nominate properties where a portion of the property is not under Federal ownership or control.

(b) When a portion of the area included in a Federal nomination is not located on land under the ownership or control of the Federal agency, but is an integral part of the cultural resource, the completed nomination form shall be sent to the State Historic Preservation Officer for notification to property owners, to give owners of private property an opportunity to concur in or object to the nomination, to solicit written comments and for submission to the State Review Board pursuant to the procedures in s 60.6.

(c) If the State Historic Preservation Officer and the State Review Board agree that the nomination meets the National Register criteria for evaluation, the nomination is signed by the State Historic Preservation Officer and returned to the Federal agency initiating the nomination. If the State Historic Preservation Officer and the State Review Board disagree, the nomination shall be returned to the Federal agency with the opinions of the State Historic Preservation Officer and the State Review Board concerning the adequacy of the nomination and whether or not the property meets the criteria for evaluation. The opinion of the State Review Board may be the minutes of the State Review Board meeting. The State Historic Preservation Officer's signed opinion and comments shall confirm to the Federal agency that the State nomination procedures have been fulfilled including notification requirements. Any comments received by the State shall be included with the letter as shall any notarized statements objecting to the listing of private property.

(d) If the owner of any privately owned property, (or a majority of the owners of such properties within a district or single property with multiple owners) objects to such inclusion by notarized statement(s) the Federal Historic Preservation Officer shall submit the nomination to the Keeper for review and a determination of eligibility, Comments, opinions, and notarized statements of objection shall be submitted with the nomination.

(e) The State Historic Preservation Officer shall notify the nonfederal owners when a concurrent nomination is listed or determination eligible for the National Register as required in s 60.6.

s 60.11 Requests for nominations.

(a) The State Historic Preservation Officer or Federal Preservation Officer as appropriate shall respond in writing within 60 days to any person or organization submitting a completed National Register nomination form or requesting consideration for any previously prepared nomination form on record with the State or Federal agency. The response shall provide a technical opinion concerning whether or not the property is adequately documented and appears to meet the National Register criteria for evaluation in s 60.4. If the nomination form is determined to be inadequately documented, the nominating authority shall provide the applicant with an explanation of the reasons for that determination.

(b) If the nomination form does not appear to be adequately documented, upon receiving notification, it shall be the responsibility of the applicant to provide necessary additional documentation.

(c) If the nomination form appears to be adequately documented and if the property appears to meet the National Register criteria for evaluation, the State Historic Preservation Officer shall comply with the notification requirements in Section 60.6 and schedule the property for presentation at the earliest possible State Review Board meeting. Scheduling shall be consistent with the State's established priorities for processing nominations. If the nomination form is adequately documented, but the property does not appear to meet National Register criteria for evaluation, the State Historic Preservation Officer need not process the nomination, unless so requested by the Keeper pursuant to s 60.12.

(d) The State Historic Preservation Officer's response shall advise the applicant of the property's position in accord with the State's priorities for processing nominations and of the approximate date the applicant can expect its consideration by the State Review Board. The State Historic Preservation Officer shall also provide notice to the applicant of the time and place of the Review Board meeting at least 30 but not more than 75 days before the meeting, as well as complying with the notification requirements in s 60.6.

(e) Upon action on a nomination by the State Review Board, the State Historic Preservation Officer shall, within 90 days, submit the nomination to the National Park Service, or, if the State Historic Preservation Officer does not consider the property eligible for the National Register, so advise the applicant within 45

days.

(f) If the applicant substantially revises a nomination form as a result of comments by the State or Federal agency, it may be treated by the State Historic Preservation Officer or Federal Preservation Officer as a new submittal and reprocessed in accord with the requirements in this section.

(g) The Federal Preservation Officer shall request the comments of the State Historic Preservation Officer and notify the applicant in writing within 90 days of receipt of an adequately documented nomination form as to whether the Federal agency will nominate the property. The Federal Preservation Officer shall submit an adequately documented nomination to the National Park Service unless in his or her opinion the property is not eligible for the National Register.

s 60.12 Nomination appeals.

(a) Any person or local government may appeal to the Keeper the failure or refusal of a nominating authority to nominate a property that the person or local government considers to meet the National Register criteria for evaluation upon decision of a nominating authority to not nominate a property for any reason when requested pursuant to s 60.11, or upon failure of a State Historic Preservation Officer to nominate a property recommended by the State Review Board. (This action differs from the procedure for appeals during the review of a nomination by the National Park Service where an individual or organization may "petition the Keeper during the nomination process," as specified in ss 60.6(t) and 60.9(i). Upon receipt of such petition the normal 45day review period will be extended for 30 days beyond the date of the petition to allow the petitioner to provide additional documentation for review.)

(b) Such appeal shall include a copy of the nomination form and documentation previously submitted to the State Historic Preservation Officer or Federal Preservation Officer, an explanation of why the applicant is submitting the appeal in accord with this section and shall include pertinent correspondence from the State Historic Preservation Officer or Federal Preservation Officer.

(c) The Keeper will respond to the appellant and the State Historic Preservation Officer or Federal Preservation Officer with a written explanation either denying or sustaining the appeal within 45 days of receipt. If the appeal is sustained, the Keeper will:

(1) Request the State Historic Preservation Officer or Federal Preservation Officer to submit the nomination to the Keeper within 15 days if the nomination has completed the procedural requirements for nomination as described in Section 60.6 or 60.9 except that concurrence of the State Review Board, State Historic Preservation Officer or Federal Preservation Officer is not required; or

(2) If the nomination has not completed these procedural requirements, request the State Historic Preservation Officer or Federal Preservation Officer to promptly process the nomination pursuant to Section 60.6 or 60.9 and submit the nomination to the Keeper without delay.

(d) State Historic Preservation Officers and Federal Preservation Officers shall process and submit such nominations if so requested by the Keeper pursuant to this section. The Secretary reserves the right to list properties in the National Register or determine properties eligible for such listing on his own motion when necessary to assist in the preservation of historic resources and after notifying the owner and appropriate parties and allowing for a 30day comment period.

(e) No person shall be considered to have exhausted administrative remedies with respect to failure to nominate a property to the National Register until he or she has complied with procedures set forth in this section. The decision of the Keeper is the final administrative action on such appeals.

s 60.13 Publication in the "Federal Register" and other NPS notification.

(a) When a nomination is received, NPS will publish notice in the FEDERAL REGISTER that the property is being considered for listing in the National Register. A 15day commenting period from date of publication will be provided. When necessary to assist in the preservation of historic properties this 15day period may be shortened or waived.

(b) NPS shall notify the appropriate State Historic Preservation Officer, Federal Preservation Officer, person or local government when there is no approved State program of the listing of the property in the National Register and will publish notice of the listing in the FEDERAL REGISTER.

(c) In nominations where the owner of any privately owned property (or a majority of the owners of such properties within a district or single property with multiple owners) has objected and the Keeper has determined the nomination eligible for the National Register, NPS shall notify the State Historic Preservation Officer, the Federal Preservation Officer (for Federal or concurrent nominations), the person or local government where there is no approved State Historic Preservation Program and the Advisory Council on Historic Preservation. NPS will publish notice of the determination of eligibility in the FEDERAL REGISTER.

s 60.14 Changes and revisions to properties listed in the National Register.

(a) Boundary changes.

(1) A boundary alteration shall be considered as a new property nomination. All forms, criteria and procedures used in nominating a property to the National Register must be used. In the case of boundary enlargements only those owners in the newly nominated as yet unlisted area need be notified and will be counted in determining whether a majority of private owners object to listing. In the case of a diminution of a boundary, owners shall be notified as specified in s 60.15 concerning removing properties from the National Register. A professionally justified recommendation by the State Historic Preservation Officer, Federal Preservation Officer, or person or local government where there is no approved State Historic Preservation Program shall be presented to NPS. During this process, the property is not taken off the National Register. If the Keeper or his or her designee finds the recommendation in accordance with the National Register criteria for evaluation, the change will be accepted. If the boundary change is not accepted, the old boundaries will remain. Boundary revisions may be appealed as provided for in ss 60.12 and 60.15.

(2) Four justifications exist for altering a boundary: Professional error in the initial nomination, loss of historic integrity, recognition of additional significance, additional research documenting that a larger or smaller area should be listed. No enlargement of a boundary should be recommended unless the additional area possesses previously unrecognized significance in American history, architecture, archeology, engineering or culture. No diminution of a boundary should be recommended unless the properties being removed do not meet the National Register criteria for evaluation. Any proposal to alter a boundary has to be documented in detail including photographing the historic resources falling between the existing boundary and the other proposed boundary.

(b) Relocating properties listed in the National Register.

(1) Properties listed in the National Register should be moved only when there is no feasible alternative for preservation. When a property is moved, every effort should be made to reestablish its historic orientation, immediate setting, and general environment.

(2) If it is proposed that a property listed in the National Register be moved and the State Historic

Preservation Officer, Federal agency for a property under Federal ownership or control, or person or local government where there is no approved State Historic Preservation Program, wishes the property to remain in the National Register during and after the move, the State Historic Preservation Officer or Federal Preservation Officer having ownership or control or person or local government where there is no approved State Historic Preservation Program, shall submit documentation to NPS prior to the move. The documentation shall discuss:

(i) The reasons for the move;

(ii) The effect on the property's historical integrity;

(iii) The new setting and general environment of the proposed site, including evidence that the proposed site does not possess historical or archeological significance that would be adversely affected by the intrusion of the property; and

(iv) Photographs showing the proposed location.

(3) Any such proposal with respect to the new location shall follow the required notification procedures, shall be approved by the State Review Board if it is a State nomination and shall continue to follow normal review procedures. The Keeper shall also follow the required notification procedures for nominations. The Keeper shall respond to a properly documented request within 45 days of receipt from the State Historic Preservation Officer or Federal Preservation Officer, or within 90 days of receipt from a person or local government where there is no approved State Historic Preservation Program, concerning whether or not the move is approved. Once the property is moved, the State Historic Preservation Officer, Federal Preservation Officer, or person or local government where there is no approved State Historic Preservation Program shall submit to the Keeper for review:

(i) A letter notifying him or her of the date the property was moved;

(ii) Photographs of the property on its new site; and

(iii) Revised maps, including a U.S.G.S. map,

(iv) Acreage, and

(v) Verbal boundary description.

The Keeper shall respond to a properly documented submittal within 45 days of receipt with the final decision on whether the property will remain in the National Register. If the Keeper approves the move, the property will remain in the National Register during and after the move unless the integrity of the property is in some unforeseen manner destroyed. If the Keeper does not approve the move, the property will be automatically deleted from the National Register when moved. In cases of properties removed from the National Register, if the State, Federal agency, or person or local government where there is no approved State Historic Preservation Program has neglected to obtain prior approval for the move or has evidence that previously unrecognized significance exists, or has accrued, the State, Federal agency, person or local government may resubmit a nomination for the property.

(4) In the event that a property is moved, deletion from the National Register will be automatic unless the above procedures are followed prior to the move. If the property has already been moved, it is the responsibility of the State, Federal agency or person or local government which nominated the property to notify the National Park Service. Assuming that the State, Federal agency or person or local government

wishes to have the structure reentered in the National Register, it must be nominated again on new forms which should discuss:

(i) The reasons for the move;

(ii) The effect on the property's historical integrity, and

(iii) The new setting and general environment, including evidence that the new site does not possess historical or archeological significance that would be adversely affected by intrusion of the property.

In addition, new photographs, acreage, verbal boundary description and a U.S.G.S. map showing the structure at its new location must be sent along with the revised nomination. Any such nomination submitted by a State must be approved by the State Review Board.

(5) Properties moved in a manner consistent with the comments of the Advisory Council on Historic Preservation, in accord with its procedures (36 CFR Part 800), are granted as exception to s 60.12(b). Moving of properties in accord with the Advisory Council's procedures should be dealt with individually in each memorandum of agreement. In such cases, the State Historic Preservation Officer or the Federal Preservation Officer, for properties under Federal ownership or control, shall notify the Keeper of the new location after the move including new documentation as described above.

s 60.15 Removing properties from the National Register.

(a) Grounds for removing properties from the National Register are as follows:

(1) The property has ceased to meet the criteria for listing in the National Register because the qualities which caused it to be originally listed have been lost or destroyed, or such qualities were lost subsequent to nomination and prior to listing;

(2) Additional information shows that the property does not meet the National Register criteria for evaluation;

(3) Error in professional judgment as to whether the property meets the criteria for evaluation; or

(4) Prejudicial procedural error in the nomination or listing process. Properties removed from the National Register for procedural error shall be reconsidered for listing by the Keeper after correction of the error or errors by the State Historic Preservation Officer, Federal Preservation Officer, person or local government which originally nominated the property, or by the Keeper, as appropriate. The procedures set forth for nominations shall be followed in such reconsiderations. Any property or district removed from the National Register for procedural deficiencies in the nomination and/or listing process shall automatically be considered eligible for inclusion in the National Register without further action and will be published as such in the FEDERAL REGISTER.

(b) Properties listed in the National Register prior to December 13, 1980, may only be removed from the National Register on the grounds established in paragraph (a) (1) of this section.

(c) Any person or organization may petition in writing for removal of a property from the National Register by setting forth the reasons the property should be removed on the grounds established in paragraph (a) of this section. With respect to nominations determined eligible for the National Register because the owners of private property object to listing, anyone may petition for reconsideration of whether or not the property meets the criteria for evaluation using these procedures. Petitions for removal are submitted to the Keeper by the State Historic Preservation Officer for State nominations, the Federal Preservation Officer for Federal

nominations, and directly to the Keeper from persons or local governments where there is no approved State Historic Preservation Program.

(d) Petitions submitted by persons or local governments where there is no approved State Historic Preservation Program shall include a list of the owner(s). In such cases the Keeper shall notify the affected owner(s) and the chief elected local official and give them an opportunity to comment. For approved State programs, the State Historic Preservation Officer shall notify the affected owner(s) and chief elected local official and give them an opportunity to comment prior to submitting a petition for removal. The Federal Preservation Officer shall notify and obtain the comments of the appropriate State Historic Preservation Officer prior to forwarding an appeal to NPS. All comments and opinions shall be submitted with the petition.

(e) The State Historic Preservation Officer or Federal Preservation Officer shall respond in writing within 45 days of receipt to petitions for removal of property from the National Register. The response shall advise the petitioner of the State Historic Preservation Officer's or Federal Preservation Officer's views on the petition.

(f) A petitioner desiring to pursue his removal request must notify the State Historic Preservation Officer or the Federal Preservation Officer in writing within 45 days of receipt of the written views on the petition.

(g) The State Historic Preservation Officer may elect to have a property considered for removal according to the State's nomination procedures unless the petition is on procedural grounds and shall schedule it for consideration by the State Review Board as quickly as all notification requirements can be completed following procedures outlined in s 60.6, or the State Historic Preservation Officer may elect to forward the petition for removal to the Keeper with his or her comments without State Review Board consideration.

(h) Within 15 days after receipt of the petitioner's notification of intent to pursue his removal request, the State Historic Preservation Officer shall notify the petitioner in writing either that the State Review Board will consider the petition on a specified date or that the petition will be forwarded to the Keeper after notification requirements have been completed. The State Historic Preservation Officer shall forward the petitions to the Keeper for review within 15 days after notification requirements or Review Board consideration, if applicable, have been completed.

(i) Within 15 days after receipt of the petitioner notification of intent to pursue his petition, the Federal Preservation Officer shall forward the petition with his or her comments and those of the State Historic Preservation Officer to the Keeper.

(j) The Keeper shall respond to a petition for removal within 45 days of receipt, except where the Keeper must notify the owners and the chief elected local official. In such cases the Keeper shall respond within 90 days of receipt. The Keeper shall notify the petitioner and the applicable State Historic Preservation Officer, Federal Preservation Officer, or person or local government where there is no approved State Historic Preservation Program, of his decision. The State Historic Preservation Officer or Federal Preservation Officer transmitting the petition shall notify the petitioner, the owner(s), and the chief elected local official in writing of the decision. The Keeper will provide such notice for petitions from persons or local governments where there is no approved State Historic Preservation Program. The general notice may be used for properties with more than 50 owners. If the general notice is used it shall be published in one or more newspapers with general circulation in the area of the nomination.

(k) The Keeper may remove a property from the National Register on his own motion on the grounds established in paragraph (a) of this section, except for those properties listed in the National Register prior to December 13, 1980, which may only be removed from the National Register on the grounds established in paragraph (a) (1) of this section. In such cases, the Keeper will notify the nominating authority, the affected owner(s) and the applicable chief elected local official and provide them an opportunity to comment. Upon

removal, the Keeper will notify the nominating authority of the basis for the removal. The state Historic Preservation Officer, Federal Preservation Officer, or person or local government which nominated the property shall notify the owner(s) and the chief elected local official of the removal.

(l) No person shall be considered to have exhausted administrative remedies with respect to removal of a property from the National Register until the Keeper has denied a petition for removal pursuant to this section.

CODE OF FEDERAL REGULATIONS
TITLE 36PARKS, FORESTS, AND PUBLIC PROPERTY
CHAPTER INATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR
PART 61PROCEDURES FOR APPROVED STATE AND LOCAL GOVERNMENT HISTORIC PRESERVATION PROGRAMS

s 61.1 Authorization.

The National Historic Preservation Act of 1966, 16; U.S.C. 470 et. seq., as amended:

(a) Requires the Secretary of the Interior (Secretary) to promulgate regulations for:

(1) Approving State historic preservation programs;

(2) Certifying local governments to carry out the purposes of the Act;

(3) The allocation by States of a share of the grants received by the States under the Act to certified local governments (CLGs);

(b) Directs the Secretary to conduct performance evaluations of State programs periodically;

(c) Directs the Secretary to administer a program of matching grantsinaid to the States for historic preservation projects and programs approved by the Secretary;

(d) Requires the Secretary to establish guidelines for the use and distribution of funds transferred to local governments to ensure that no local government receives a disproportionate share of the funds available; and

(e) Requires the Secretary to make information available concerning professional methods and techniques for the preservation of historic properties and the administration of historic preservation programs.

s 61.2 Definitions.

As used in this part:

(a) "Approved State program" means a State historic preservation program that has been approved by the Secretary of the Interior in accordance with Sec. 101(b) of the National Historic Preservation Act, as amended. All State programs will be treated as approved programs until December 12, 1983, unless specifically disapproved by the Secretary before that time.

(b) "Certified local government" means a local government that has been certified to carry out the purposes of the National Historic Preservation Act, as amended, in accordance with section 101(c) of the Act.

(c) "Chief elected local official" means the elected head of a local government.

(d) "CLG share" means the funding authorized for transfer to local governments in accordance with section 103(c) of the National Historic Preservation Act, as amended.

(e) "Comprehensive historic preservation planning" means an ongoing process that is consistent with technical standards issued by the Department of the Interior and which produces reliable, understandable, and uptodate information for decisionmaking related to the identification, evaluation, and protection/treatment of historic resources.

(f) "Comprehensive statewide historic preservation plan" means the part of the planning process that conforms to the Secretary's Standards for Preservation Planning and is approved as part of the State Program Approval Process. The comprehensive plan entails the organization into a logical sequence of preservation information pertaining to identification, evaluation, registration, and treatment of historic properties, and setting priorities for accomplishing preservation activities.

(g) "Historic Preservation Fund" means the monies accrued under the Outer Continental Shelf Lands Act, as amended, to support the program of matching grantsinaid to the States for historic preservation programs and projects, as authorized by Sec. 101(d)(1) of the National Historic Preservation Act, as amended.

(h) "Historic preservation review commission" means a board, council, commission, or other similar collegial body which is established in accordance with s 61.4 (c)(2) of these rules.

(i) "Local government" means a city, county, parish, township, municipality, or borough, or any other general purpose political subdivision of any State.

(j) "National Register of Historic Places" means the national list of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture, maintained by the Secretary of the Interior under authority of section 101(a)(1)(A) of the National Historic Preservation Act, as amended.

(k) "The National Register Programs Manual" means the manual that sets forth NPS administrative procedures and guidelines for activities concerning the federally related historic preservation programs of the National Trust for Historic Preservation, the States, and local governments. This manual includes guidelines and procedures for the administration of the historic preservation grantsinaid program, and supercedes the HPF Grants Management Manual.

(l) "National Park Service" means the bureau of the Department of the Interior to which the Secretary of the Interior has delegated the authority and responsibility for administering the National Historic Preservation Program.

(m) "Secretary" means the Secretary of the Interior. Unless otherwise stated in law or regulation, the Secretary has delegated the authority and responsibility for administering the National Historic Preservation Program to the National Park Service.

(n) "Secretary's Standards and Guidelines" means the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. The Standards and Guidelines provide technical information about archeological and historic preservation activities and methods. The Standards and Guidelines are prepared under the authority of Sections 101(f), (g), and
(h), and Section 110 of the Act. The subjects covered in the Standards and Guidelines may include: Preservation Planning, Identification, Evaluation, Registration, Historic Research and Documentation, Architectural and Engineering Documentation, Archeological Investigation, Historic Preservation Projects, and Preservation Terminology.

(o) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and

the Trust Territories of the Pacific Islands.

(p) "State Historic Preservation Officer" is the official within each State who has been designated and appointed by the Governor to administer the State historic preservation program in the State.

(q) "State Program" means the State historic preservation program in the State.

(r) "Subgrantee" means the agency, institution, organization or individual to which a subgrant is made by the State and which is accountable to the State for use of the funds provided.

s 61.3 Implementation of 36 CFR Part 61.

(a) The National Register Programs Manual. The National Park Service maintains this Manual for the use of the States, Certified Local Governments, and the National Trust for Historic Preservation in performing federally related historic preservation activities authorized by the National Historic Preservation Act, as amended.

(1) The Manual is the vehicle through which the National Park Service implements 36 CFR Part 61.

(2) The Manual provides guidelines and procedures for approved historic preservation programs to use matching grant assistance for preservation program activities.

(3) The Manual does not include technical information on preservation techniques.

(b) The Secretary of the Interior's Standards and Guidelines. The National Register Programs Manual includes The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. The Standards and Guidelines apply to federally authorized activities and will be used by the National Park Service as the technical performance standards for matters covered by these rules.

(c) Availability of The National Register Programs Manual.

(1) Copies of the Manual may be obtained from the National Park Service.

(2) The National Park Service issues updates of the Manual as necessary and annually issues a summary of all additions, changes, or deletions made during the previous fiscal year.

s 61.4 Approved State Programs.

(a) A State Historic Preservation Officer (SHPO) shall be appointed by the Governor to administer the State historic preservation program.

(b) It shall be the responsibility of the SHPO to:

(1) Direct and conduct a comprehensive statewide survey of historic properties and maintain an inventory of such properties; this high priority responsibility entails locating historic and archeological resources at a level of documentation such that the resources can be evaluated for potential nomination to the National Register of Historic Places and so that the survey data collected can be incorporated into State priorities and planning decisions concerning the area surveyed;

(2) Identify and nominate eligible properties to the National Register of Historic Places and otherwise administer applications for the National Register (see 36 CFR Part 60: "National Register of Historic Places");

(3) Prepare and implement a comprehensive statewide historic preservation planning process; this high priority responsibility entails the organization of preservation activities (identification, evaluation, registration, and treatment of historic properties) into a logical interrelated sequence so that effective and efficient decisions and/or recommendations can be made concerning preservation in the State;

(4) Administer the State program of Federal assistance for historic preservation within the State; if Historic Preservation Fund (HPF) monies are appropriated, this includes the administration of the HPF GrantinAid program;

(5) Advise and assist Federal, State, and local government agencies in carrying out their historic preservation responsibilities;

(6) Cooperate with the Secretary, the Advisory Council on Historic Preservation, and other Federal, State, and local government agencies to ensure that historic properties are taken into consideration at all levels of planning and development;

(7) Provide public information, education, training, and technical assistance relating to the National and State historic preservation programs; and otherwise fulfill the State's liaison responsibility with the Federal preservation programs, other States, local governments, Indian tribes, private organizations, and individuals;

(8) Cooperate with local governments in development of local historic preservation programs and assist local governments in becoming certified.
(c)(1) State programs shall be approved by the Secretary if he determines that the program meets the requirements of paragraphs (a), (b), (d), (e), and (f) of this section. Compliance with these requirements shall be evaluated by the Secretary as required by s 61.4 of these regulations. These evaluations shall determine the State's continued eligibility for approved program status.

(2) Procedures for Review and Approval of State Historic Preservation Programs.

(i) The Secretary will evaluate each State program for compliance with the requirements of the Act and other applicable laws and regulations. The program evaluation process will be conducted after the end of every second or third fiscal year. It will be rigorous with respect to assessing the State's performance of the requirements in the Act. The State programs will be selectively examined to the depth of existing regulations and standards pertinent to each requirement but only to the extent these were in effect during the performance period being evaluated. The Secretary will verify the accuracy of required periodic State reports used in allocating grant funds and in reporting on the status of the national historic preservation program and provide States with analyses of program strengths and weaknesses.

(ii) The categories of activities to be evaluated are:

(A) Requirements of the Act.

(1) Legal authority and designation of the State Historic Preservation Officer.

(2) State Staff Qualifications and Composition.

(3) State Review Board Qualifications and Composition.

(4) Historic Preservation Fund Grant Management.

(5) Comprehensive Historic Preservation Planning.

(6) Survey and Inventory.

(7) National Register.

(8) Public Participation.

(9) Technical Assistance to Governmental Agencies.

(10) Review and Compliance.

(11) Public Education.

(12) Certification Assistance to Local Governments.

(B) Conditions and other requirements as specified in The National Register Programs Manual (NPS Guideline 49).

(C) Annual Historic Preservation Fund grant applications.

(D) OMB circular and Treasury requirements.

(E) Appropriate implementing regulations.

(iii) The Secretary will use a combination of onsite and offsite inquiries to perform the evaluation. To achieve uniformity of review and comprehensive coverage of the approval criteria, the following questions will generally form the basis for verifying State activities for each of the requirements:

(A) Is there an adequate system or process in place for the requirement?

(B) Is the system or process being used such that a minimal level of activity for each requirement can be demonstrated?

(C) Have all conditions of any grant awards been met?

(D) Are the data contained in the previous year's EndofYear Report accurate?
(iv) Approval Method.

(A) States meeting all requirements in the review will receive immediate official notice that their approved status is continued.

(B) States not meeting all requirements will receive immediate notice of deficiencies along with recommendations on how to correct them. The Secretary will defer making a decision on program approval for up to a 4 month period during which time technical assistance in correcting the problems will be offered. States must either correct cited deficiencies, or provide an acceptable justification for requiring additional time and a plan and timetable for correcting deficiencies. During this period, States have the opportunity to appeal to the Secretary any findings and recommendations.

(C) States successfully resolving deficiencies will receive notice from the Secretary that their approved status is continued. Once approved status is renewed, States will not be reviewed until the next regular evaluation

period, although evaluations may be conducted more often in individual States if the Secretary deems this necessary. The Secretary may disapprove a State program as a result of any such evaluation subject to the provisions of Sec. 61.4(c)(2)(iv) (A), (B), and (D).

(D) States will be "disapproved" only when, after the expiration of the specified period, they are officially notified that their approved status is removed for failure to correct cited deficiencies. The Secretary will then initiate financial suspension and other actions in accordance with administrative guidelines specified in The National Register Programs Manual (NPS Guideline 49).

(v) Instructions on carrying out the evaluation process are provided in The National Register Programs Manual (NPS Guideline 49).

(d) A professionally qualified staff shall be appointed or employed by the State historic preservation program.

(1) Except as approved pursuant to paragraph (d)(2) of this section, the staff shall include at a minimum, one fulltime professional in each of the following disciplines: history, archeology, and architectural history. Required professional State staff members shall meet the standards set forth in Appendix A to these rules. Two or more parttime staff members may be substituted for one fulltime professional in any of the required disciplines as long as the equivalent of one fulltime professional is achieved in each discipline. States shall determine what other professional disciplines, such as planning, law, architecture, historic architecture, historical archeology, accounting and grants management are needed to carry out the responsibilities of the State historic preservation program. State professional staff members approved by the Secretary prior to September 21 1977, shall remain approved until such time that they are no longer employed on the State staff.

(2) The Secretary will consider proposals submitted by States for alternative staffing requirements for States with resources and needs which cannot be served or met by the composition outlined in paragraph (d)(1) of this section. Such alternative requirements must ensure adequate professional expertise on the staff, comparable to that required in paragraph (d)(1) of this section, to perform the required responsibilities of the State. These proposals will be reviewed and approved by the Secretary in writing on a StatebyState basis. Approved alternatives will remain in effect until they are reviewed, at the Secretary's discretion, or at the request of the State.

(3) The State shall annually certify according to procedures provided by the Secretary that the State program meets the minimum staffing requirements.

(4) When a required staff position becomes vacant, and if the expertise of the person filling that position is required by law, regulation, or implementing procedure the State shall take immediate steps to ensure that the requisite expertise is replaced. This may be done on a temporary basis (such as by contracting the responsibility) pending the permanent filling of the vacant required staff position. Measures taken pursuant to s 61.4(d)(2) or s 61.8 are other possible techniques to follow. However, States should ensure that technical matters are addressed by the corresponding technical expertise.

(5) If these requirements for permanent required staff are not met for a period exceeding three months, the State shall communicate by letter to NPS, the timetable for filling the vacancy, or propose an alternative pursuant to paragraph (d)(2) of this section.

(6) If the lapse in staffing requirements persists for more than six months, the Secretary may require further restrictions in State program operations or HPF financial assistance that will remain in effect until the staff vacancy has been filled or an alternative has been approved by the Secretary pursuant to paragraph (d)(2) of this section.

(e) An adequate and qualified State historic preservation Review Board shall be designated by the SHPO unless an alternative method of appointment is provided by State law.

(1) The State Review Board shall consist of at least five persons. The Review Board shall consist of members who have demonstrated a competence, interest, or knowledge in historic preservation and a majority of Review Board members shall be recognized professionals in the following and related disciplines defined in Appendix A to these rules. Except as approved pursuant to paragraph (e)(4) of this section, the membership shall include a minimum of one professional in each of the following disciplines: history, prehistoric and historic archeology, and architectural history and architecture. All of these professionals shall meet the standards set forth in Appendix A. The State shall determine what other professional disciplines and/or additional members are needed.

(2) The archeologist shall be qualified in both prehistoric and historic archeology, or an additional qualified person shall be appointed to the State Review Board so that expertise in both prehistoric and historic archeology will be represented.

(3) The architectural historian or architect shall be qualified in both architectural history and architecture or an additional qualified person shall be appointed to the State Review Board so that expertise in both architectural history and architecture will be represented.

(4) The Secretary will consider proposals for alternative Review Board requirements for States with historic resources and needs which cannot be served or met by the composition outlined in paragraph (e)(1) of this section. Such alternative requirements must ensure adequate professional expertise on the Review Board, comparable to that required in paragraph (e)(1) of this section to perform the responsibilities of the Review Board. Such proposals will be reviewed and approved in writing by the Secretary on a StatebyState basis. Approved alternatives will remain in effect until they are reviewed, at the Secretary's discretion, or at the request of the State.

(5) The State shall annually certify according to procedures provided by the Secretary that the State program meets the minimum Review Board requirements. If these requirements are not met for a period exceeding three months, the State shall communicate by letter to the Secretary, the timetable for filling the vacancy, or propose to NPS an alternative pursuant to paragraph (e)(4) of this section. During such lapse in minimum Review Board requirements, the State shall take steps to ensure that temporary measures provide expertise so that the Review Board continues to operate as a professional body that can objectively evaluate the historic significance of properties and provide professional advice on historic preservation matters. If a lapse in Review Board requirements persists for more than six months, the Secretary may require further restrictions in State program operations or HPF financial assistance to remain in effect until the Review Board vacancy has been filled or an alternative has been proposed and approved by the Secretary pursuant to paragraph (e)(4) of this section.

(6) The State Review Board shall meet at least three times a year and shall adopt procedures governing its operations consistent with the provisions of this section. In making decisions the Review Board must have access to the expertise necessary to make objective professional judgments.

(7) The responsibilities that the State Review Board performs include, but need not be limited to, the following:

(i) Reviewing each National Register nomination proposal prior to submission to the National Register to determine whether or not the property meets the National Register criteria for evaluation, and to make a recommendation that the State nominate or reject the proposed nomination;

(ii) Participating in the review of appeals to National Register nominations and providing written opinions on the significance of the properties;

(iii) Providing advice to the State about documentation submitted in conjunction with the Historic Preservation Fund including but not limited to grant applications, endofyear reports, and the State comprehensive historic preservation planning process;

(iv) Providing general advice, guidance, and professional recommendations to the SHPO in carrying out the duties and responsibilities listed in s 61.4(b).

(f) Mechanisms shall be provided for adequate public participation in the State historic preservation program. As part of the process of recommending properties to the National Register, the State shall comply with all consultation and notification procedures contained in 36 CFR Part 60.6.

(g) Any State may carry out all or any part of its responsibilities by contract or cooperative agreement with any qualified nonprofit organization, educational institution or otherwise pursuant to State law. A State may not delegate its responsibility for compliance with grant assistance terms and conditions.

s 61.5 Approved Local Programs.

(a) All approved State programs shall provide a mechanism for certifying local governments to participate in the National program.

(b) All approved State historic preservation programs shall develop, for approval by the Secretary, procedures for the certification of local governments. Procedures also shall be defined for removal of CLG status for cause. States shall indicate specific requirements for certification, specific responsibilities that will be delegated to certified local governments (CLGs), and the schedule for the certification process. The requirements outlined in paragraph (c) of this section must be incorporated into the State's process for local certification that is submitted to the Secretary for approval. Beyond the minimum delegations of authority that must be made to all CLGs, States may make additional delegations of responsibility to individual CLGs. These delegations may not include the State's overall responsibility derived from the National Historic Preservation Act, as amended, or where specified by law or regulation (e.g., the operations of the Review Board and nominations to the National Register). Regulations and standards governing performance of State functions (e.g., rules relating to conflict of interest) are to be enforced by States when the functions are delegated.

(c) States shall require local governments to satisfy the following minimum requirements:

(1) Enforce appropriate State or local legislation for the designation and protection of historic properties. The State shall define what constitutes appropriate legislation so long as it is consistent with the purposes of the Act. Where State enabling legislation or home rule authority permits local historic preservation ordinances, a State may require adoption of an ordinance and indicate specific provisions that must be included in the ordinance.

(2) Establish by State or local law an adequate and qualified historic preservation review commission (Commission) composed of professional and lay members. All Commission members shall have a demonstrated interest, competence, or knowledge in historic preservation. To the extent available in the community, the local government shall appoint professional members from the disciplines of architecture, history, architectural history, planning, archeology, or other historic preservation related disciplines, such as urban planning, American Studies, American Civilization, Cultural Geography, or Cultural Anthropology.

(i) States may specify the minimum number and type of professional members that the local government shall appoint to the Commission and indicate how additional expertise can be obtained. Requirements set by the State for local Commissions shall not be more stringent or comprehensive than its requirements for the State Review Board. Local governments may be certified without the minimum number or types of disciplines if they can demonstrate that they have made a reasonable effort to fill those positions. When a discipline is not represented in the Commission membership, the Commission shall be required to seek expertise in this area when considering National Register nominations and other actions that will impact properties which are normally evaluated by a professional in such discipline. This can be accomplished through consulting (e.g., universities, private preservation organizations, or regional planning commissions) or by other means that the State determines appropriate.

(ii) States shall specify the role and responsibilities of the local government's Commission in local preservation decisions. These responsibilities must be complementary to and carried out in coordination with those of the State as outlined in s 61.4(b) of these rules.

(iii) States shall make available orientation materials and training to all local Commissions. The orientation and training shall be designed to provide a working knowledge of the roles and operations of Federal, State, and local preservation programs.

(3) Maintain a system for the survey and inventory of historic properties. States shall formulate guidelines for local survey and inventory systems which ensure that such systems and the data they produce can be readily integrated into statewide comprehensive historic preservation planning and other appropriate planning processes. Local government survey and inventory efforts shall be coordinated with and complementary to those of the State. The State also shall require that local survey data be in a format that is consistent with the planning processes noted above.

(4) Provide for adequate public participation in the historic preservation program, including the process of recommending properties to the National Register. States shall require adequate public participation in relation to all responsibilities that are delegated to CLGs. States shall outline specific mechanisms to ensure adequate public participation in local preservation programs. These may include requirements for open meetings, published minutes, and the publication of procedures by which assessments of potential National Register nominations, design review, etc. will be carried out as well as compliance with appropriate regulations. National Register notification requirements may be found in 36 CFR Part 60.

(5) Satisfactorily perform the responsibilities delegated to it under the Act. States shall monitor and evaluate the performance of CLGs. States shall outline procedures and standards by which the performance of CLGs in program operation and administration will be evaluated. Written records shall be maintained for all State evaluations of CLGs so that results are available for the Secretary's performance evaluations of States. If a State evaluation of a CLG's performance indicates that, in the State's judgment, such performance is inadequate, the State shall suggest ways to improve performance. If, after a period of time stipulated by the State, the State determines that there has not been sufficient improvement, it may recommend decertification of the local government to the Secretary for his concurrence. This recommendation shall cite the specific reasons why decertification is proposed. If the Secretary does not object within 30 working days of receipt, the decertification shall be considered approved by the Secretary. Appropriately documented State recommendations for decertification ordinarily will be accepted by the Secretary. When a local government is decertified, the State shall conduct financial assistance closeout procedures as specified in The National Register Programs Manual.

(d) Effects of certification:

(1) Inclusion in the process of nominating properties to the National Register of Historic Places in accordance with Sections 101 (c)(2)(A) and (c)(2)(B) of the Act. The State may delegate to a CLG any of the responsibilities of the SHPO and the State Review Board in processing National Register nominations as specified in 36 CFR Part 60, except for the authority to review and nominate properties directly to the National Register. CLGs may make nominations directly to the National Park Service only when the State does not have an approved program. States shall ensure that CLG performance of these responsibilities is consistent and coordinated with the identification, evaluation, and preservation priorities of the comprehensive State historic preservation planning process.

(2) Eligibility to apply for a portion of the State's annual HPF grant. At least 10 percent of the State's annual HPF apportionment shall be set aside for transfer to CLGs. All CLGs in the State shall be eligible to receive funds from the designated CLG share of the State's annual HPF grant; no government, however, is automatically entitled to receive funds. Local governments that receive these monies shall be considered subgrantees of the State.

(3) The requirements set forth in paragraph (c) of this section may be amplified by the Secretary and/or the States as necessary to reflect particular State and or local government program concerns.
(e) States shall submit, within 180 days of publication of the final rule for local certification and funds transfer, their proposed local certification processes to the Secretary for review and approval. In developing the submission, the State shall consult with local governments, local historic preservation commissions, and all other parties likely to be interested in the CLG process; consider local preservation needs and capabilities; and invite comments on the proposed process from local governments, commissions, and parties in the State likely to be interested. The State's proposal shall review the results of this consultation process. States shall keep a record of their consultation processes and make them available to the Secretary upon request.

(f) States shall establish procedures to ensure that all parties likely to be interested are notified and provide a 60day period for public comment on the proposal before it is submitted to the Secretary. Records of all comments received during the commenting period shall be kept by the State and shall be made available to the Secretary upon request. The State should be able to respond to all suggestions that it does not adopt.

(g) The Secretary shall review State proposals and within 90 days of receipt issue an approval or disapproval. This review will be based on compliance with all requirements set forth in this section.

(h) If a State proposal is disapproved, the Secretary will recommend changes that would make the proposed process acceptable and, in consultation with the State, will designate a date by which the revision must be submitted. Final approval by the Secretary must be achieved by October 1, 1985, or States will be ineligible to continue their approved State program status beyond that time.

(i) A State may begin certification of local governments as soon as the State's proposed certification process is approved by the Secretary. When a local government certification request has been approved in accordance with the State's approved certification process, the State shall prepare a written certification agreement that lists the specific responsibilities of the local government when certified. The State shall forward to the Secretary a copy of the approved request and the certification agreement. If the Secretary does not take exception to the request within 15 working days of receipt, the local government shall be regarded as certified by the Secretary.

(j) A State may agree with a CLG to change the delegation of responsibilities by amending the certification agreement. The State must submit the amendment to the National Park Service for review to ensure that it is in conformance with the approved State process, this rule, and the Act. If the National Park Service does not object within 15 working days, the amendment shall be considered approved.

(k) States may amend their approved State certification and funds transfer processes. In developing the amendment, the State shall follow to the extent appropriate the same consultation procedures outlined in s 61.5(e)/(f) and s 61.7(g)(h). The State shall submit the proposed amendment to the National Park Service. The National Park Service shall review the proposed amendment for conformance with this rule and the Act, and, within 45 working days of receipt, issue an approval or disapproval notice.

(l) State administration of its local certification process shall be reviewed by the Secretary during performance evaluations and audits of State programs as required by section 101(b)(2) of the National Historic Preservation Act, as amended. Local governments may appeal to the Secretary State decisions to deny certification or to decertify. Appealed actions shall be examined for conformance with approved State procedures for CLGs, these regulations, and the Act.

(m) The District of Columbia shall be exempted from the requirements of section 61.5 because there are no subordinated local governments in the District. If a territory believes that its political subdivisions lack authorities similar to those of local governments in other States and hence cannot satisfy the requirements for local certification, it may apply to the Secretary for exemption from the requirements of s 61.5.

(n) Procedures for direct certification by the Secretary where there is no approved State program.

(1) When there is no approved State program, local governments wishing to be certified must apply directly to the Secretary.

(2) The application must demonstrate that the local government meets the specifications for certification set forth in paragraph (c) of this section.

(3) The Secretary shall review certification applications under this subsection and take action within 90 days of receipt.

(4) To the extent feasible, the Secretary will ensure that there is consistency and continuity in the CLG program of a State that does not have an approved historic preservation program. Therefore, if a now disapproved State program had an approved local government certification process and had already certified local governments, the Secretary will consider the process in his review of any applications for local government certification from within the State.

s 61.6 Grants to Approved State Programs.

(a) All States with approved State historic preservation programs shall be eligible for matching grantsinaid from the Historic Preservation Fund for carrying out the responsibilities of the SHPO including preparing comprehensive statewide historic surveys and plans, and for preserving and protecting properties listed in the National Register of Historic Places.

(b) Administration of HPF matching grantsinaid shall be in accordance with The National Register Programs Manual. States receiving HPF grants shall adhere to the procedures and guidelines in The National Register Programs Manual and its supplements.

(c) States are responsible, through financial audit, for the proper accounting of HPF grants in accordance with OMB Circular A102, Attachment P, "Audit Requirements," and The National Register Programs Manual.

(d) States are responsible, through the program performance evaluation requirements of s 61.4(c), for administration of HPF grants in accordance with the requirements of this section.

s 61.7 Transfer of Grants to Certified Local Governments.

(a) At least 10 percent of each State's annual HPF allocation shall be designated for transfer by States to CLGs as subgrants. States may transfer more than 10 percent unless otherwise prohibited. Any year in which the annual HPF State grant appropriation exceeds $65,000,000, one half of the excess shall also be transferred to CLGs according to procedures to be provided by the Secretary.

(b) All CLGs shall be eligible to receive funds from the 10 percent (or greater) CLG share of the State's total annual HPF grant award. The State is not required to award funds to all governments that are eligible to receive funds.

(c) CLGs receiving HPF grants from the CLG share shall be considered subgrantees of the State. Transferred monies shall not be applied as matching share for any other Federal grant.

(d) States shall require all local governments receiving a portion of the local share of the State's annual HPF grant to satisfy the following minimum requirements:

(1) Maintain adequate financial management systems. Local financial management systems shall be in accordance with the standards specified in OMB Circular A102, Attachment G, "Standards for Grantee Financial Management Systems." Local financial management systems shall be auditable in accordance with the General Accounting Office's Standards for Audit of Governmental Organizations, Programs, Activities, and Functions. States shall be responsible, through financial audit, for the proper accounting of HPF CLG share monies in accordance with OMB Circular A102, Attachment P, "Audit Requirements." The periodic State evaluations of CLG performance shall include an assessment of the fiscal management of HPF monies.

(2) Adhere to all requirements of The National Register Programs Manual. The National Register Programs Manual sets forth administrative procedures and policies for HPF grants awarded by the Secretary. It serves as a basic reference for the State management of HPF grants. Indirect costs may be charged as part of the CLG grant only if the CLG subgrantee meets the requirements of the Manual. Unless the CLG has a current indirect cost rate approved by the cognizant Federal agency, only direct costs may be charged.

(3) Adhere to any requirements mandated by Congress regarding the use of such funds. The Secretary will advise States of any directives contained in annual appropriations laws regarding the use of HPF State grants that must be applied to local governments receiving a share of these grants.

(e) The requirements listed in paragraph (d) of this section shall be used by States as minimum requirements for local governments receiving HPF funds; they also shall be included in the State's required written grant agreement with the local government. States may require specific uses of funds as long as such requirements are consistent with the State comprehensive historic preservation planning process and are eligible for HPF assistance.

(f) Each State shall develop, for approval by the Secretary, a procedure for allocating the CLG share of its annual Historic Preservation Fund grant to eligible local governments in the State. States shall articulate a clear rationale on which funding decisions will be based. Although only aggregate program matching funds are required, States may require a matching share for CLG grants, but if excess matching funds are available from other sources, ability to provide matching funds need not be a primary allocation factor. Allocation procedures shall include guidelines for the review of applications and the selection of applicants. At a minimum, these guidelines shall include the following:

(1) The amount awarded to any applicant must be sufficient to produce a specific impact. While no lower limit is prescribed by these rules, States must ensure that the funds awarded are sufficient to generate effects directly as a result of the funds transfer. The requirement for tangible results may not be waived even if there are many otherwise eligible applicants for the amount set aside for CLG share; States may use additional funds from their regular HPF annual grant to satisfy competing demands.

(2) To promote local preservation activities, States shall make reasonable efforts to distribute these monies among the maximum number of eligible local jurisdictions to the extent that such distribution is consistent with paragraph (f)(1) of this section. States also shall seek to ensure a reasonable distribution between urban and rural areas in the State. States must ensure that no CLG receives a disproportionate share of the allocation.

(3) States shall make available to the public, upon request, the rationale for the applicants selected and the amounts awarded.

(g) Within 180 days of publication of final rules for local certification and funds transfer, but not before submitting their proposed local certification process, States shall submit to the Secretary for review and approval their proposed procedure for transfer of funds.

(h) States shall set up notice procedures to ensure that all parties likely to be interested are notified and provide a 60day period for public comment on the proposal before it is submitted to the Secretary. Records of all comments received during the commenting period shall be kept by the State and shall be made available to the Secretary upon request.

(i) The Secretary shall review State proposals and within 90 days of receipt issue an approval or disapproval. This review will be based on compliance with the requirements set forth in this section.

(j) If a State proposal is disapproved, the Secretary will recommend changes that would make the proposed process acceptable and, in consultation with the State, will designate a date by which the revision must be submitted. Final approval by the Secretary must be achieved by October 1, 1985, or States will be ineligible to continue their approved State program status beyond that time.

(k) Once a State's proposed process for funds transfer has been approved by the Secretary and the Secretary has obligated the State's annual HPF grant, the State shall begin the transfer of HPF monies unless otherwise prohibited as a consequence of actions described in s 61.7(d)(3).

(l) Each State shall ensure that its procedure is widely publicized so that all eligible local governments have the opportunity to apply for funding.

(m) States shall be responsible for reviewing requests from CLG subgrantees for grant amendments as required by OMB Circular A87, and for issuing approval or denial of such requests. If any action by a CLG will result in a change in the overall grant project or budget requiring NPS approval, the State shall obtain such approval prior to granting approval to the CLG subgrantee. A State shall not forward to NPS any action which is inconsistent with the purpose or terms of the grant. CLG subgrantee requests for revisions to the grant are invalid unless they are in writing and signed by an authorized official of the State grantee.

(n) State performance in transferring funds to CLGs shall be reviewed by the Secretary during performance evaluations and audits of State programs as required by Sec. 101(b)(2) of the National Historic Preservation Act, as amended.

(o) States may submit grant amendment requests to NPS to reallocate monies set aside for local governments in instances where no certified governments exist, wish to receive funds, or are qualified to receive funds. Such requests will be considered grant reprogramming actions and shall be submitted to NPS not less than one calendar year after the beginning of the fiscal year of the State's HPF appropriation. All such requests shall clearly document the State's attempts to encourage and assist local governments in developing local historic preservation programs pursuant to Section 61.5 of these regulations, in being certified, and in applying for funding.

(p) The District of Columbia shall be exempted from the requirements of s 61.7 because there are no subordinate local governments in the District. If a territory believes that its political subdivisions lack authorities similar to those of local governments in other States and hence cannot satisfy the requirements for local certification, it may apply to the Secretary for exemption from the requirements of s 61.7.

(q) Where there is no approved State program, the method for allocating funds will be determined by the Secretary in accordance with the procedures set forth for States in this section. To the extent feasible, there should be consistency and continuity in funding allocation policy of the CLG program of a State that does not have an approved historic preservation program. Therefore, if a now disapproved State program had an approved allocation process, the Secretary will consider it in the review of any application for funding from CLGs within that State.

s 61.8 Waiver.

The Secretary may waive any of the requirements of these rules which are not mandated by statute or by governmentwide regulations, if, in his/her opinion, as expressed in writing to the State, the State historic preservation program would benefit from such waiver, and the purposes, conditions, and requirements of the National Historic Preservation Act, as amended, would not be compromised.

s 61.9 Information Collection Requirements.

The information collection requirements contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3507, et seq., and assigned clearance number 10240038. The information is being collected as part of the process of reviewing the procedures and programs of State and local governments participating in the National historic preservation program. The information will be used to evaluate those procedures and programs. The obligation to respond is required to obtain a benefit.

Appendix A to Part 61Professional Qualifications Standards

In the following definitions, a year of fulltime professional experience need not consist of a continuous year of fulltime work but may be made up of discontinuous periods of fulltime or parttime work adding up to the equivalent of a year of fulltime experience.

(a) History. The minimum professional qualifications in history are a graduate degree in history or closely related field; or a bachelor's degree in history or closely related field plus one of the following:

(1) At least two years of fulltime experience in research, writing, teaching, interpretation or other demonstrable professional activity with an academic institution, historical organization or agency, museum, or other professional institution; or

(2) Substantial contribution through research and publication to the body of scholarly knowledge in the field

of history.

(b) Archeology. The minimum professional qualifications in archeology are a graduate degree in archeology, anthropology, or closely related field plus:

(1) At least one year of fulltime professional experience or equivalent specialized training in archeological research, administration or management;

(2) At least four months of supervised field and analytic experience in general North American archeology; and

(3) Demonstrated ability to carry research to completion.

In addition, to these minimum qualifications, a professional in prehistoric archeology shall have at least one year of fulltime professional experience at a supervisory level in the study of archeological resources of the prehistoric period. A professional in historic archeology shall have at least one year of fulltime professional experience at a supervisory level in the study of archeological resources of the historic period.

(c) Architectural history. The minimum professional qualifications in architectural history are a graduate degree in architectural history, art history, historic preservation, or closely related field, with coursework in American architectural history; or a bachelor's degree in architectural history, art history, historic preservation, or closely related field plus one of the following:

(1) At least two years of fulltime experience in research, writing, or teaching in American architectural history or restoration architecture with an academic institution, historical organization or agency, museum, or other professional institution; or

(2) Substantial contribution through research and publication to the body of scholarly knowledge in the field of American architectural history.

(d) Architecture. The minimum professional qualifications in architecture are a professional degree in architecture plus at least two years of fulltime professional experience in architecture; or a State license to practice architecture.

(e) Historic Architecture. The minimum professional qualifications in historic architecture are a professional degree in architecture of State license to practice architecture, plus one of the following:

(1) At least one year of graduate study in architectural preservation, American architectural history, preservation planning, or closely related field; or

(2) At least one year of fulltime professional experience on historic preservation projects. Such graduate study or experience shall include detailed investigations of historic structures, preparation of historic structures research reports, and preparation of plans and specification for preservation projects.

Appendix B to Part 61Information Sources

The following National Park Service Regional Offices and State Historic Preservation Offices are sources of information concerning the programs covered by these regulations.

Alaska Regional Office

Alaska Regional Office, 2520 Gambell Street, Anchorage, Alaska 99503, 907277 1666

Alaska: Chief of History and Archeology, Division of Parks, Department of Natural Resources, 619 Warehouse Avenue, Suite 210, Anchorage, Alaska 99501, 9072744646

MidAtlantic Region

MidAtlantic Region, 143 South Third St., Philadelphia, PA 19106, 2155978068

Connecticut: Connecticut Historical Commission, 59 South Prospect Street, Hartford, Connecticut 06106, 2035663005

Delaware: Division of Historical & Cultural Affairs, Hall of Records, Dover, Delaware, 19901, 3026785314

District of Columbia: Dept. of Consumer and Regulatory Affairs, 614 H Street, NW., Washington, D.C. 20001, 2025351500

Indiana: Department of Natural Resources, 608 State Office Building, Indianapolis, Indiana 46204, 317232-4020

Maine: Maine Historic Preservation Commission, 55 Capitol Street, Station 65, Augusta, Maine 04333, 207-2892132

Maryland: State Historic Preservation Officer John Shaw House, 21 State Circle, Annapolis, Maryland 21401, 3012692851

Massachusetts: Massachusetts Historical Commission, 294 Washington Street, Boston, Massachusetts 02108, 6177278470

Michigan: Michigan History Division, Department of State, Lansing, Michigan 48918, 5173736362

New Hampshire: Department of Resources & Economic Development, P.O. Box 856, Concord, New Hampshire 03301, 6032713484 or 3558

New Jersey: Department of Environmental Protection, CN 402, Trenton, New Jersey 08625, 6092922885

New York: Office of Parks Recreation & Historic Preservation, Agency Building #1, Empire State Plaza, Albany, New York 12238, 5184740468

Ohio: State Historic Preservation Officer, The Ohio Historical Society, Interstate 71 at 17th Avenue, Columbus, Ohio 43211, 6144661500

Pennsylvania: State Historic Preservation Officer, Pennsylvania Historical & Museum Commission, P.O. Box 1026, Harrisburg, Pennsylvania 17120, 7177872891

Commonwealth of Puerto Rico: Office of Cultural Affairs, La Fortaleza, San Juan, Puerto Rico 00901, 809-7242100

Rhode Island: Rhode Island Department of Community Affairs, 150 Washington Street, Providence, Rhode Island 02903, 4012772850

Vermont: Secretary, Agency for Development & Community Affairs, Pavilion Office Building, Montpelier, Vermont 05602, 8028283226

Virgin Islands: Virgin Islands Planning Board, Charlotte Amalie, St. Thomas, Virgin Islands 00801, 809774-7859

Virginia: Virginia Historic Landmarks Commission, 221 Governor Street, Richmond, Virginia 23219, 804786-3142

West Virginia: Department of Culture & History, State Capitol Complex, Charleston, West Virginia 25304, 3043480244

Rocky Mountain Region

Rocky Mountain Region, P.O. Box 25287, Denver Federal Center, Denver, CO 80225, 3032342560

Colorado: State Historic Preservation Officer, Colorado Heritage Center, 1300 Broadway, Denver, Colorado 80203, 3038663394

Illinois: Department of Conservation, 405 East Washington, Springfield, Illinois 62706, 2177823340

Iowa: Iowa State Historical Dept., Office of Historic Preservation, Historical Building, East 12th Street and Grand Avenue, Des Moines, Iowa 50319, 515281 5113

Kansas: Kansas State Historical Society, 120 West 10th Street, Topeka, Kansas 66612, 9132963251

Minnesota: Minnesota Historical Society, 690 Cedar Street, St. Paul, Minnesota 55101, 6122962747

Missouri: State Department of Natural Resources, P.O. Box 176, Jefferson City, Missouri 65101, 314751-4422

Montana: Montana Historical Society, 225 North Roberts Street, Veterans Memorial Building, Helena, Montana 59601, 4064492694

Nebraska: The Nebraska State Historical Society, 1500 R Street, Lincoln, Nebraska 68508, 4024713850

New Mexico: Historic Preservation Division, Office of Cultural Affairs, Villa Rivera, Room 101, 228 E. Palace Avenue, Santa Fe, New Mexico 87503, 505827 8320

North Dakota: State Historical Society of North Dakota, Liberty Memorial Building, Bismarck, North Dakota 58501, 7012242667

Oklahoma: State Historic Preservation Officer, Oklahoma Historical Society, Historical Building, Oklahoma City, Oklahoma 73105, 4055212491

South Dakota: State Historic Preservation Officer, Historical Preservation Center, University of South Dakota, Alumni House, Vermillion, South Dakota 57069, 6056775314

Texas: Texas Historical Commission, P.O. Box 12276, Capitol Station, Austin, Texas 78711, 5124753092

Utah: Utah State Historical Society, 300 Rio Grande, Salt Lake City, Utah 84101, 8015337039

Wisconsin: State Historical Society of Wisconsin, 816 State Street, Madison, Wisconsin 53706, 6082623266

Wyoming: Wyoming Recreation Commission, 1920 Thomas Street, Cheyenne, Wyoming 82002, 307777-7695

Southeast Regional Office

Southeast Region, 75 Spring St., NW., Atlanta, Georgia 30303, 4042422651

Alabama: Alabama Historical Commission, 725 Monroe Street, Montgomery, Alabama 36104, 2058326510

Arkansas: Arkansas Historic Preservation Program, Continental Building, Suite 500, Markham and Main Streets, Little Rock, Arkansas 72201, 5013712763

Florida: Bureau of Historic Preservation, Department of State, The Capitol, Tallahassee, Florida 32301, 904-4872333

Georgia: Chief, Historic Preservation Section, Department of Natural Resources, 270 Washington, Street SW., Room 703C, Atlanta, Georgia 30334, 4046562840

Kentucky: State Historic Preservation Office, Kentucky Heritage Council, Capitol Plaza Tower, 9th floor, Frankfort, Kentucky 40601, 5025647005

Louisiana: Office of Cultural Development, P.O. Box 44247, Baton Rouge, Louisiana 70804, 5049253880

Mississippi: Department of Archives & History, P.O. Box 571, Jackson, Mississippi 39205, 6013591424

North Carolina: Department of Cultural Resources, 109 East Jones Street, Raleigh, North Carolina 27611, 9197337305

South Carolina: Department of Archives & History, 1430 Senate Street, Columbia, South Carolina 29211, 8037585816

Tennessee: Department of Conservation, 701 Broadway, Nashville, Tennessee 37203, 6157426747

Western Regional Office

Western Region, 450 Golden Gate Ave., San Francisco, CA 94102, 4155567741

American Samoa: Territorial Historic Preservation Officer, Department of Public Works, Government of American Samoa, Pago Pago, American Samoa 96799

Arizona: Chief, Office of Historic Preservation, Arizona State Parks, 1688 West Adams, Phoenix, Arizona 85007, 6022554174

California: State Historic Preservation Officer, Office of Historic Preservation, Department of Parks & Recreation, P.O. Box 2390, Sacramento, California 95811, 9164458006

Guam: Department of Parks & Recreation, P.O. Box 2950, Agana, Guam 96910, 477 9620/21, Ext. 4

Hawaii: State Historic Preservation Officer, Department of Land & Natural Resources, P.O. Box 621, Honolulu, Hawaii 96809, 8085487460

Idaho: Historic Preservation Coordinator, Idaho Historical Society, 610 North Julia Davis Drive, Boise, Idaho 83706, 2083342120

Nevada: State Historic Preservation Officer, Dept. of Conservation & Natural Resources, Rm. 123, 201 S Fall Street, Carson City, Nevada 89710, 7028855138

Northern Mariana Islands: Historic Preservation Officer, c/o Department of Community & Cultural Affairs, Commonwealth of the Northern Mariana Islands, Saipan, Mariana Islands
96950, 7012242667

Oregon: State Parks Superintendent, 525 Trade Street SE, Salem, Oregon 97310, 5033786305

Trust Territory of the Pacific Islands: State Historic Preservation Officer, Land Resources Branch, Department of Resources & Development, Trust Territory of the Pacific Islands, Saipan, Mariana Islands 96950

Washington: State Historic Preservation Officer, 111 West 21st Avenue, KL11, Olympia, Washington 98504, 2067534011

CODE OF FEDERAL REGULATIONS
TITLE 36--PARKS, FORESTS, AND PUBLIC PROPERTY
CHAPTER I-NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR
PART 63--DETERMINATIONS OF ELIGIBILITY FOR INCLUSION IN THE NATIONAL REGISTER OF HISTORIC PLACES

s 63.1 Purpose and authorities.

(a) These regulations have been developed to assist Federal agencies in identifying and evaluating the eligibility of properties for inclusion in the National Register. The regulations explain how to request determinations of eligibility under section 2(b) of Executive Order 11593 and the regulations of the Advisory Council on Historic Preservation (36 CFR Part 800) for implementation of sections 1(3) and 2(b) of Executive Order 11593 and the National Historic Preservation Act of 1966, as amended Federal agencies request determinations of eligibility in considering historic properties on lands under their jurisdiction or control or on lands to be affected by proposed actions.

s 63.2 Determination of eligibility process.

The Department of the Interior will respond within 45 days of receipt of a documented request for a determination of eligibility from a Federal agency when it is submitted in accordance with the following regulations and is accompanied by documentation that clearly portrays the nature and significance of the property.

(a) The agency shall consult the State Historic Preservation Officer as the first step in identifying historic properties for information concerning:

(a)(1) Properties listed in the National Register.

(a)(2) Properties in the process of nomination to the National Register.

(a)(3) Properties determined eligible by the Secretary of the Interior for listing in the National Register.

(a)(4) Any other available information that would assist in identifying properties in the area affected by the proposed action.

(b) If the State Historic Preservation Officer has inadequate information to document the presence or absence of historic properties in the project area, the Federal agency should refer to the Department of the Interior's criteria for the identification of historic properties and the guidelines for level of documentation to accompany requests for determinations of eligibility for inclusion in the National Register published as a notice in the Federal Register.

(c) The agency shall, in consultation with the State Historic Preservation Officer, apply the National Register Criteria for Evaluation contained in 36 CFR 60.6 to all potentially eligible properties that may be affected by the proposed action. If a property appears to meet the Criteria and the State Historic Preservation Officer agrees, the agency should follow the procedures in s 63.3. If there is a question whether the Criteria are met, the agency shall complete the procedures in s 63.3(d). A question on whether a property meets the Criteria exists when the agency and the State Historic Preservation Officer disagree or when the agency determines that a question exists. The Department of the Interior will provide general and specific advice concerning the identification of historic properties and will bring to the attention of a Federal agency any information received from the public regarding potential historic properties in the area affected by its plans or projects.

(d) The agency shall submit a letter of request for a determination of eligibility with a description, statement of significance, photographs, and a map, or a statement in accord with s 63.3 below, if applicable, directly to the Keeper of the National Register, National Park Service, Department of the Interior, Washington, D.C. 20240. If available, the opinion of the State Historic Preservation Officer on the eligibility of the property should also be forwarded with the request.

(e) The Keeper, National Register, will respond in writing to the agency's request within 45 days of receipt of a documented request submitted in accord with s 63.2(d) of these procedures. If the opinion of the State Historic Preservation Officer is not included with the request, the Keeper of the National Register will provide to the State Historic Preservation Officer a copy of the request and will ask for his opinion on the property. If the Keeper does not receive the State Historic Preservation Officer's response within three weeks of the State Historic Preservation Officer's receipt of a letter from the Keeper requesting an opinion, the Keeper will proceed with the determination and will inform the agency that the State Historic Preservation Officer did not give an opinion. If the Keeper of the National Register determines that documentation submitted with the request is not sufficient to make a professional evaluation of the significance of the property, he will advise the agency in writing of the additional information needed. The Keeper of the National Register will respond to the agency's request within 45 days of receipt of documentation on the property requested by the Keeper.

s 63.3 Procedures to be applied when the Agency and the State Historic Preservation Officer agree a property is eligible.

If during the consultation described in s 63.2(c), both the agency and the State Historic Preservation Officer agree that a property meets the Criteria, the Federal agency or the State Historic Preservation Officer shall forward to the Keeper of the National Register (a) a letter signed by the agency stating that the agency and the State Historic Preservation Officer agree that the property is eligible for inclusion in the National Register, and (b) a statement signed by the State Historic Preservation Officer that in his opinion the property is eligible for the National Register. Either the letter or the statement must contain substantive information on the property, including a description, specific boundaries, its significance under National Register Criteria, and an explanation of why the property is eligible for listing in the National Register. The Keeper of the National Register shall give written notice of his determination to both the agency and the State Historic Preservation Officer within 10 working days of receipt. If the property has not been accurately identified and evaluated, the Keeper will inform the agency and the State Historic Preservation Officer within 10 working days and will recommend that the agency follow the process set forth at s 63.2. Notwithstanding such recommendation, the Federal agency or the Keeper of the National Register may consider the property eligible for the purpose of obtaining the Advisory Council on Historic Preservation's comments. Documentation concerning properties determined eligible for the National Register shall be kept on file by the agency and the State Historic Preservation Officer.

s 63.4 Other properties on which determinations of eligibility may be made by the Secretary of the Interior.

(a) The Keeper of the National Register will make determinations of eligibility on properties nominated by Federal agencies under section 2(a) of Executive Order 11593 prior to returning the nominations for such properties to the agency for technical or professional revision or because of procedural requirements. Such determinations of eligibility will be made only if sufficient information exists to establish the significance of the property and its eligibility for the National Register.

(b) Any property or district removed from the National Register for procedural deficiencies in the nomination and/or listing process shall automatically be considered eligible for inclusion in the National Register without further action and will be published as such in the Federal Register.

(c) If necessary to assist in the protection of historic resources, the Keeper, upon consultation with the appropriate State Historic Preservation Officer and concerned Federal agency, if any, may determine

properties to be eligible for listing in the National Register under the Criteria established by 36 CFR Part 60 and shall publish such determinations in the Federal Register. Such determinations may be made without a specific request from the Federal agency or, in effect, may reverse findings on eligibility made by a Federal agency and State Historic Preservation Officer. Such determinations will be made after an investigation and an onsite inspection of the property in question.

s 63.5 Federal Register publication of properties determined eligible.

In addition to written notice to the Federal agency and the State Historic Preservation Officer, public notice of properties determined eligible for the National Register will be published in the Federal Register at regular intervals and in a cumulative annual edition usually issued in February. Determinations in accord with s 63.3 will be identified with an asterisk.

s 63.6 Review and nomination of properties determined eligible.

The Keeper of the National Register will conduct an annual review of the condition of properties determined eligible for the National Register. The Keeper of the National Register will obtain from the Advisory Council on Historic Preservation information on decisions made concerning eligible properties in accord with memorandum of agreement under the Council's "Procedures for the Protection of Historic and Cultural Properties" (36 CFR Part 800). If there is no memorandum of agreement or if no provision has been made in a memorandum of agreement for nomination of an eligible property and if the property retains the characteristics that made it eligible for the National Register, the Keeper of the National Register will take the following steps:

(a) For a property owned by a Federal agency, or under the jurisdiction or control of the agency to the extent that the agency substantially exercises the attributes of ownership, the Keeper of the National Register will request the Federal agency to nominate the property to the National Register within six months.

(b) If the property is not under Federal jurisdiction or control, the Keeper of the National Register will request that the State Historic Preservation Office nominate the property to the National Register within six months.

If the Keeper of the National Register determines that a property has lost the characteristics that made it eligible for the National Register, he will inform the State Historic Preservation Officer and the Federal agency and remove the property from the list of eligible properties.

CODE OF FEDERAL REGULATIONS
TITLE 36PARKS, FORESTS, AND PUBLIC PROPERTY
CHAPTER INATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR
PART 65--NATIONAL HISTORIC LANDMARKS PROGRAM

65.1 Purpose and authority.
65.2 Effects of designation.
65.3 Definitions.
65.4 National Historic Landmark Criteria.
65.5 Designation of National Historic Landmarks.
65.6 Recognition of National Historic Landmarks.
65.7 Monitoring National Historic Landmarks.
65.8 Alteration of National Historic Landmark Boundaries.
65.9 Withdrawal of National Historic Landmark Designation.
65.10 Appeals for designation.

Authority: 16 U.S.C. 461 et seq., 16 U.S.C. 470 et seq.

s 65.1 Purpose and authority.

The purpose of the National Historic Landmarks Program is to identify and designate National Historic Landmarks, and encourage the long range preservation of nationally significant properties that illustrate or commemorate the history and prehistory of the United States. These regulations set forth the criteria for establishing national significance and the procedures used by the Department of the Interior for conducting the National Historic Landmarks Program.

(a) In the Historic Sites Act of 1935 (45 Stat. 666, 16 U.S.C. 461 et seq.) the Congress declared that it is a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States and

(b) To implement the policy, the Act authorizes the Secretary of the Interior to perform the following duties and functions, among others:

(b)(1) To make a survey of historic and archeological sites, buildings and objects for the purpose of determining which possess exceptional value as commemorating or illustrating the history of the United States;

(b)(2) To make necessary investigations and researches in the United States relating to particular sites, buildings or objects to obtain true and accurate historical and archeological facts and information concerning the same; and

(b)(3) To erect and maintain tablets to mark or commemorate historic or prehistoric places and events of national historical or archeological significance.

(c) The National Park Service (NPS) administers the National Historic Landmarks Program on behalf of the Secretary.

s 65.2 Effects of designation.

(a) The purpose of the National Historic Landmarks Program is to focus attention on properties of exceptional value to the nation as a whole rather than to a particular State or locality. The program recognizes and promotes the preservation efforts of Federal, State and local agencies, as well as of private organizations and individuals and encourages the owners of landmark properties to observe preservation precepts.

(b) Properties designated as National Historic Landmarks are listed in the National Register of Historic Places upon designation as National Historic Landmarks. Listing of private property on the National Register does not prohbit under Federal law or regulations any actions which may otherwise be taken by the property owner with respect to the property.

(c) Specific effects of designation are:

(c)(1) The National Register was designed to be and is administered as a planning tool. Federal agencies undertaking a project having an effect on a listed or eligible property must provide the Advisory Council on Historic Preservation a reasonable opportunity to comment pursuant to Section 106 of the National Historic Preservation Act of 1966, as amended. The Advisory Council has adopted procedures concerning, inter alia, their commenting responsibility in 36 CFR Part 800.

(c)(2) Section 110(f) of the National Historic Preservation Act of 1966, as amended, requires that before approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council a reasonable opportunity to comment on the undertaking.

(c)(3) Listing in the National Register makes property owners eligible to be considered for Federal grants-in-aid and loan guarantees (when implemented) for historic preservation.

(c)(4) If a property is listed in the National Register, certain special Federal income tax provisions may apply to the owners of the property pursuant to Section 2124 of the Tax Reform Act of 1976, the Economic Recovery Tax Act of 1981 and the Tax Treatment Extension Act of 1980.

(c)(5) If a property contains surface coal resources and is listed in the National Register, certain provisions of the Surface Mining and Control Act of 1977 require consideration of a property's historic values in determining issuance of a surface coal mining permit.

(c)(6) Section 8 of the National Park System General Authorities Act of 1970, as amended (90 Stat. 1940, 16 U.S.C. 1-5), directs the Secretary to prepare an annual report to Congress which identifies all National Historic Landmarks that exhibit known or anticipated damage or threats to the integrity of their resources. In addition, National Historic Landmarks may be studied by NPS for possible recommendation to Congress for inclusion in the National Park System.

(c)(7) Section 9 of the Mining in the National Parks Act of 1976 (90 Stat. 1342, 16 U.S.C. 1980) directs the Secretary of the Interior to submit to the Advisory Council a report on any surface mining activity which the Secretary has determined may destroy a National Historic Landmark in whole or in part, and to request the advisory Council's advice on alternative measures to mitigate or abate such activity.

s 65.3 Definitions.

As used in this rule:

(a) "Advisory Council" means the Advisory Council on Historic Preservation, established by the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 et seq.). Address: Executive Director, Advisory Council on Historic Preservation, 1522 K Street NW, Washington, DC 20005.

(b) "Chief elected local official" means the mayor, county judge or otherwise titled chief elected administrative official who is the elected head of the local political jurisdiction in which the property is located.

(c) "Advisory Board" means the National Park System Advisory Board which is a body of authorities in several fields of knowledge appointed by the Secretary under authority of the Historic Sites Act of 1935, as amended.

(d) "Director" means Director, National Park Service.

(e) "District" means a geographically definable area, urban or rural, that possesses a significant concentration, linkage or continuity of sites, buildings, structures or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history.

(f) "Endangered property" means a historic property which is or is about to be subjected to a major impact that will destroy or seriously damage the resources which make it eligible for National Historic Landmark designation.

(g) "Federal Preservation Officer" means the official designated by the head of each Federal agency responsible for coordinating that agency's activities under the National Historic Preservation Act of 1966, as amended, including nominating properties under that agency's ownership or control to the National Register.

(h) "Keeper" means the Keeper of the National Register of Historic Places.

(i) "Landmark" means National Historic Landmark and is a district, site, building, structure or object, in public or private ownership, judged by the Secretary to possess national significance in American history, archeology, architecture, engineering and culture, and so designated by him.

(j) "National Register" means the National Register of Historic Places, which is a register of districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering and culture, maintained by the Secretary. (Section 2(b) of the Historic Sites Act of 1935 (49 Stat. 666, 16 U.S.C. 461) and Section 101(a)(1) of the National Historic Preservation Act of 1966 (80 Stat. 915; 16 U.S.C. 470), as amended.) (Address: Chief, Interagency Resource Management Division, 440 G Street NW, Washington, DC 20243.)

(k) "National Historic Landmarks Program" means the program which identifies, designates, recognizes, lists, and monitors National Historic Landmarks conducted by the Secretary through the National Park Service. (Address: Chief, History Division, National Park Service, Washington, DC 20240; addresses of other participating divisions found throughout these regulations.)

(l) "Object" means a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.

(m) "Owner" or "owners" means those individuals, partnerships, corporations or public agencies holding fee simple title to property. "Owner" or "owners" does not include individuals, partnerships, corporations or public agencies holding easements or less than fee interests (including leaseholds) of any nature.

(n) "Property" means a site, building, object, structure or a collection of the above which form a district.

(o) "Secretary" means the Secretary of the Interior.

(p) "Site" means the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined or vanished, where the location itself maintains historical or archeological value regardless of the value of any existing structure.

(q) "State official" means the person who has been designated in each State to administer the State Historic Preservation Program.

(r) "Structure" means a work made by human beings and composed of interdependent and interrelated parts in a definite pattern of organization.

s 65.4 National Historic Landmark Criteria.

The criteria applied to evaluate properties for possible designation as National Historic Landmarks or possible determination of eligibility for National Historic Landmark designation are listed below. These criteria shall be used by NPS in the preparation, review and evaluation of National Historic Landmark studies. They shall be used by the Advisory Board in reviewing National Historic Landmark studies and preparing recommendations to the Secretary. Properties shall be designated National Historic Landmarks only if they are nationally significant. Although assessments of national significance should reflect both public perceptions and professional judgments, the evaluations of properties being considered for landmark designation are undertaken by professionals, including historians, architectural historians, archeologists and anthropologists familiar with the broad range of the nation's resources and historical themes. The criteria applied by these specialists to potential landmarks do not define significance nor set a rigid standard for quality. Rather, the criteria establish the qualitative framework in which a comparative professional analysis of national significance can occur. The final decision on whether a property possesses national significance is made by the Secretary on the basis of documentation including the comments and recommendations of the public who participate in the designation process.

(a) Specific Criteria of National Significance: The quality of national significance is ascribed to districts, sites, buildings, structures and objects that possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, engineering and culture and that possess a high degree of integrity of location, design, setting, materials, workmanship, feeling and association, and:

(a)(1) That are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represent, the broad national patterns of United States history and from which an understanding and appreciation of those patterns may be gained; or

(a)(2) That are associated importantly with the lives of persons nationally significant in the history of the United States; or

(a)(3) That represent some great idea or ideal of the American people; or

(a)(4) That embody the distinguishing characteristics of an architectural type specimen exceptionally valuable for a study of a period, style or method of construction, or that represent a significant, distinctive and exceptional entity whose components may lack individual distinction; or

(a)(5) That are composed of integral parts of the environment not sufficiently significant by reason of

historical association or artistic merit to warrant individual recognition but collectively compose an entity of exceptional historical or artistic significance, or outstandingly commemorate or illustrate a way of life or culture; or

(a)(6) That have yielded or may be likely to yield information of major scientific importance by revealing new cultures, or by shedding light upon periods of occupation over large areas of the United States. Such sites are those which have yielded, or which may reasonably be expected to yield, data affecting theories, concepts and ideas to a major degree.

(b) Ordinarily, cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings and properties that have achieved significance within the past 50 years are not eligible for designation. Such properties, however, will qualify if they fall within the following categories:

(b)(1) A religious property deriving its primary national significance from architectural or artistic distinction or historical importance; or

(b)(2) A building or structure removed from its original location but which is nationally significant primarily for its architectural merit, or for association with persons or events of transcendent importance in the nation's history and the association consequential; or

(b)(3) A site of a building or structure no longer standing but the person or event associated with it is of transcendent importance in the nation's history and the association consequential; or

(b)(4) A birthplace, grave or burial if it is of a historical figure of transcendent national significance and no other appropriate site, building or structure directly associated with the productive life of that person exists; or

(b)(5) A cemetery that derives its primary national significance from graves of persons of transcendent importance, or from an exceptionally distinctive design or from an exceptionally significant event; or

(b)(6) A reconstructed building or ensemble of buildings of extraordinary national significance when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other buildings or structures with the same association have survived; or

(b)(7) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own national historical significance; or

(b)(8) A property achieving national significance within the past 50 years if it is of extraordinary national importance.

s 65.5 Designation of National Historic Landmarks.

Potential National Historic Landmarks are identified primarily by means of theme studies and in some instances by special studies. Nominations and recommendations made by the appropriate State officials, Federal Preservation Officers and other interested parties will be considered in scheduling and conducting studies.

(a) Theme studies. NPS defines and systematically conducts organized theme studies which encompass the major aspects of American history. The theme studies provide a contextual framework to evaluate the relative significance of historic properties and determine which properties meet National Historic Landmark criteria. Theme studies will be announced in advance through direct notice to appropriate State officials,

Federal Preservation Officers and other interested parties and by notice in the Federal Register. Within the established thematic framework, NPS will schedule and conduct National Historic Landmark theme studies according to the following priorities. Themes which meet more of these priorities ordinarily will be studied before those which meet fewer of the priorities:

(a)(1) Theme studies not yet begun as identified in "History and Prehistory in the National Park System," 1982.

(a)(2) Theme studies in serious need of revision.

(a)(3) Theme studies which relate to a significant number of properties listed in the National Register bearing opinions of State Historic Preservation Officers and Federal Preservation Officers that such properties are of potential national significance. (Only those recommendations which NPS determines are likely to meet the landmarks criteria will be enumerated in determining whether a significant number exists in a theme study.)

(a)(4) Themes which reflect the broad planning needs of NPS and other Federal agencies and for which the funds to conduct the study are made available from sources other than the regularly programmed funds of the National Historic Landmarks Program.

(b) Special Studies. NPS will conduct special studies for historic properties outside of active theme studies according to the following priorities:

(b)(1) Studies authorized by Congress or mandated by Executive Order will receive the highest priority.

(b)(2) Properties which NPS determines are endangered and potentially meet the National Historic Landmarks criteria, whether or not the theme in which they are significant has been studied.

(b)(3) Properties listed in the National Register bearing State or Federal agency recommendations of potential national significance where NPS concurs in the evaluation and the property is significant in a theme already studied.

(c)(1) When a property is selected for study to determine its potential for designation as a National Historic Landmark, NPS will notify in writing, except as provided below, (i) the owner(s), (ii) the chief elected local official, (iii) the appropriate State official, (iv) the Members of Congress who represent the district and State in which the property is located, and, (v) if the property is on an Indian reservation, the chief executive officer of the Indian tribe, that it will be studied to determine its potential for designation as a National Historic Landmark. This notice will provide information on the National Historic Landmarks Program, the designation process and the effects of designation.

(c)(2) When the property has more than 50 owners, NPS will notify in writing (i) the chief elected local official, (ii) the appropriate State official, (iii) the Members of Congress who represent the district and State in which the property is located, and, (iv) if the property is on an Indian reservation, the chief executive officer of the Indian tribe, and (v) provide general notice to the property owners. This general notice will be published in one or more local newspapers of general circulation in the area in which the potential National Historic Landmark is located and will provide information on the National Historic Landmarks Program, the designation process and the effects of designation. The researcher will visit each property selected for study unless it is determined that an onsite investigation is not necessary. In the case of districts with more than 50 owners NPS may conduct a public information meeting if widespread public interest so warrants or on request by the chief elected local official.

(c)(3) Properties for which a study was conducted before the effective date of these regulations are not

subject to the requirements of paragraph (c) (1) and (2) of this section.

(c)(4) The results of each study will be incorporated into a report which will contain at least (i) a precise description of the property studied; and (ii) an analysis of the significance of the property and its relationship to the National Historic Landmark criteria.

(d)(1) Properties appearing to qualify for designation as National Historic Landmarks will be presented to the Advisory Board for evaluation except as specified in subsection (h) of this section.

(d)(2) Before the Advisory Board's review of a property, NPS will provide written notice of this review, except as provided below, and a copy of the study report to (i) the owner(s) of record; (ii) the appropriate State official; (iii) the chief elected local official; (iv) the Members of Congress who represent the district and State in which the property is located; and, (v) if the property is located on an Indian reservation, the chief executive officer of the Indian tribe. The list of owners shall be obtained from official land or tax record, whichever is most appropriate, within 90 days prior to the notification of intent to submit to the Advisory Board. If in any State the land or tax record is not the appropriate list an alternative source of owners may be used. NPS is responsible for notifying only those owners whose names appear on the list. Where there is more than one owner on the list each separate owner shall be notified.

(d)(3) In the case of a property with more than 50 owners, NPS will notify, in writing, (i) the appropriate State official; (ii) the chief elected local official; (iii) the Members of Congress who represent the district and State in which the property is located; (iv) if the property is located on an Indian reservation, the chief executive officer of the Indian tribe; and, (v) will provide general notice to the property owners. The general notice will be published in one or more local newspapers of general circulation in the area in which the property is located. A copy of the study report will be made available on request. Notice of Advisory Board review will also be published in the Federal Register.

(d)(4) Notice of Advisory Board review will be given at least 60 days in advance of the Advisory Board meeting. The notice will state date, time and location of the meeting; solicit written comments and recommendations on the study report; provide information on the National Historic Landmarks Program, the designation process and the effects of designation and provide the owners of private property not more than 60 days in which to concur in or object in writing to the designation. Notice of Advisory Board meetings and the agenda will also be published in the Federal Register. Interested parties are encouraged to submit written comments and recommendations which will be presented to the Advisory Board. Interested parties may also attend the Advisory Board meeting and upon request will be given an opportunity to address the Board concerning a property's significance, integrity and proposed boundaries.

(d)(5) Upon notification, any owner of private property who wishes to object shall submit to the Chief, History Division, a notarized statement that the party is the sole or partial owner of record of the property, as appropriate, and objects to the designations. Such notice shall be submitted during the 60- day commenting period. Upon receipt of notarized objections respecting a district or an individual property with multiple ownership it is the responsibility of NPS to ascertain whether a majority of owners have so objected. If an owner whose name did not appear on the list certifies in a written notarized statement that the party is the sole or partial owner of a nominated private property such owner shall be counted by NPS in determining whether a majority of owners has objected. Each owner of private property in a district has one vote regardless of how many properties or what part of one property that party owns and regardless of whether the property contributes to the significance of the district.

(d)(6) The commenting period following notification can be waived only when all property owners and the chief elected local official have agreed in writing to the waiver.

(e)(1) The Advisory Board evalutes such factors as a property's significance, integrity, proposed boundaries and the professional adequancy of the study. If the Board finds that these conditions are met, it may recommend to the Secretary that a property be designated or declared eligible for designation as a National Historic Landmark. If one or more of the conditions are not met, the Board may recommend that the property not be designated a landmark or that consideration of it be deferred for further study, as appropriate. In making its recommendation, the Board shall state, if possible, whether or not it finds that the criteria of the landmarks program have been met. A simple majority is required to make a recommendation of designation. The Board's recommendations are advisory.

(e)(2) Studies submitted to the Advisory Board (or the Consulting Committee previously under the Heritage Conservation and Recreation Service) before the effective date of these regulations need not be resubmitted to the Advisory Board. In such instances, if a property appears to qualify for designation, NPS will provide notice and a copy of the study report to the parties as specified in subsections (d)(2) and (3) of this section and will provide at least 30 days in which to submit written comments and to provide an opportunity for owners to concur in or object to the designation.

(e)(3) The Director reviews the study report and the Advisory Board recommendations, certifies that the procedural requirements set forth in this section have been met and transmits the study reports, the recommendations of the Advisory Board, his recommendations and any other recommendations and comments received pertaining to the properties to the Secretary.

(f) The Secretary reviews the nominations, recommendations and any comments and, based on the criteria set forth herein, makes a decision on National Historic Landmark designation. Properties that are designated National Historic Landmarks are entered in the National Register of Historic Places, if not already so listed.

(f)(1) If the private owner or, with respect to districts or individual properties with multiple ownership, the majority of such owners have objected to the designation by notarized statements, the Secretary shall not make a National Historic Landmark designation but shall review the nomination and make a determination of its eligibility for National Historic Landmark designation.

(f)(2) The Secretary may thereafter designate such properties as National Historic Landmarks only upon receipt of notarized statements from the private owner (or majority of private owners in the event of a district or a single property with multiple ownership) that they do not object to the designation.

(f)(3) The Keeper may list in the National Register properties considered for National Historic Landmark designation which do not meet the National Historic Landmark criteria but which do meet the National Register criteria for evaluation in 36 CFR Part 60 or determine such properties eligible for the National Register if the private owners or majority of such owners in the case of districts object to designation. A property determined eligible for National Historic Landmark designation is determined eligible for the National Register.

(g) Notice of National Historic Landmark designation, National Register listing, or a determination of eligibility will be sent in the same manner as specified in subsections (d)(2) and (3) of this section. For properties which are determined eligible the Advisory Council will also be notified. Notice will be published in the Federal Register.

(h)(1) The Secretary may designate a National Historic Landmark without Advisory Board review through accelerated procedures described in this section when necessary to assist in the preservation of a nationally significant property endangered by a threat of imminent damage or destruction.

(h)(2) NPS will conduct the study and prepare a study report as described in subsection (c)(4) of this section.

(h)(3) If a property appears to qualify for designation, the National Park Service will provide notice and a copy of the study report to the parties specified in subsections (d)(2) and (3) and will allow at least 30 days for the submittal of written comments and to provide owners of private property an opportunity to concur in or object to designation as provided in subsection (d)(5) of this section except that the commenting period may be less than 60 days.

(h)(4) The Director will review the study report and any comments, will certify that procedural requirements have been met, and will transmit the study report, his and any other recommendations and comments pertaining to the property to the Secretary.

(h)(5) The Secretary will review the nomination and recommendations and any comments and, based on the criteria set forth herein, make a decision on National Historic Landmark designation or a determination of eligibility for designation if the private owners or a majority of such owners of historic districts object.

(h)(6) Notice of National Historic Landmark designation or a determination of eligibility will be sent to the same parties specified in subsections (d)(2) and (3) of this section.

s 65.6 Recognition of National Historic Landmarks.

(a) Following designation of a property by the Secretary as a National Historic Landmark, the owner(s) will receive a certificate of designation. In the case of a district, the certificate will be delivered to the chief elected local official or other local official, or to the chief officer of a private organization involved with the preservation of the district, or the chief officer of an organization representing the owners of the district, as appropriate.

(b) NPS will invite the owner of each designated National Historic Landmark to accept, free of charge, a landmark plaque. In the case of a district, the chief elected local official or other local official, or the chief officer of an organization involved in the preservation of the district, or chief officer of an organization representing the owners of the district, as appropriate, may accept the plaque on behalf of the owners. A plaque will be presented to properties where the appropriate recipient(s) (from those listed above) agrees to display it publicly and appropriately.

(c) The appropriate recipient(s) may accept the plaque at any time after designation of the National Historic Landmark. In so doing owners give up none of the rights and privileges of ownership or use of the landmark property nor does the Department of the Interior acquire any interest in property so designated.

(d) NPS will provide one standard certificate and plaque for each designated National Historic Landmark. The certificate and plaque remain the property of NPS. Should the National Historic Landmark designation at any time be withdrawn, in accordance with the procedures specified in s 65.9 of these rules, or should the certificate and plaque not be publicly or appropriately displayed, the certificate and the plaque, if issued, will be reclaimed by NPS.

(e) Upon request, and if feasible, NPS will help arrange and participate in a presentation ceremony.

s 65.7 Monitoring National Historic Landmarks.

(a) NPS maintains a continuing relationship with the owners of National Historic Landmarks. Periodic visits, contacts with State Historic Preservation Officers, and other appropriate means will be used to determine whether landmarks retain their integrity, to advise owners concerning accepted preservation standards and techniques and to update administrative records on the properties.

(b) Reports of monitoring activities form the basis for the annual report submitted to Congress by the Secretary of the Interior, as mandated by Section 8, National Park System General Authorities Act of 1970, as amended (90 Stat. 1940, 16 U.S.C. 1a-5). The Secretary's annual report will identify those National Historic Landmarks which exhibit known or anticipated damage or threats to their integrity. In evaluating National Historic Landmarks for listing in the report, the seriousness and imminence of the damage or threat are considered, as well as the integrity of the landmark at the time of designation taking into account the criteria in
Section 65.4.

(c) As mandated in Section 9, Mining in the National Parks Act of 1976 (90 Stat. 1342, 16 U.S.C. 1980), whenever the Secretary of the Interior finds that a National Historic Landmark may be irreparably lost or destroyed in whole or in part by any surface mining activity, including exploration for, removal or production of minerals or materials, the Secretary shall (1) notify the person conducting such activity of that finding; (2) submit a report thereon, including the basis for his finding that such activity may cause irreparable loss or destruction of a National Historic Landmark, to the Advisory Council; and (3) request from the Council advice as to alternative measures that may be taken by the United States to mitigate or abate such activity.

(d) Monitoring activities described in this section, including the preparation of the mandated reports to Congress and the Advisory Council are carried out by NPS regional offices under the direction of the Preservation Assistance Division, NPS [Address: Chief, Resource Assistance Division, National Park Service, 440 G Street NW, Washington, DC 20243] in consultation with the History Division, NPS.

s 65.8 Alteration of National Historic Landmark boundaries.

(a) Two justifications exist for enlarging the boundary of a National Historic Landmark: Documentation of previously unrecognized significance or professional error in the original designation. Enlargement of a boundary will be approved only when the area proposed for addition to the National Historic Landmark possesses or contributes directly to the characteristics for which the landmark was designated.

(b) Two justifications exist for reducing the boundary of a National Historic Landmark: Loss of integrity or professional error in the original designation. Reduction of a boundary will be approved only when the area to be deleted from the National Historic Landmark does not possess or has lost the characteristics for which the landmark was designated.

(c) A proposal for enlargement or reduction of a National Historic Landmark boundary may be submitted to or can originate with the History Division, NPS. NPS may restudy the National Historic Landmark and subsequently make a proposal, if appropriate, in the same manner as specified in s 65.5 (c) through (h). In the case of boundary enlargements only those owners in the newly nominated but as yet undesignated area will be notified and will be counted in determining whether a majority of private owners object to listing.

(d)(1) When a boundary is proposed for a National Historic Landmark for which no specific boundary was identified at the time of designation, NPS shall provide notice, in writing, of the proposed boundary to (i) the owner(s); (ii) the appropriate State official; (iii) the chief elected local official; (iv) the Members of Congress who represent the district and State in which the landmark is located, and (v) if the property is located on an Indian reservation, the chief executive officer of the Indian tribe, and shall allow not less than 30 nor more than 60 days for submitting written comments on the proposal. In the case of a landmark with more than 50 owners, the general notice specified in s 65.5(d)(3) will be used. In the case of National Historic Landmark districts for which no boundaries have been established, proposed boundaries shall be published in the Federal Register for comment and be submitted to the Committee on Energy and Natural Resources of the United States Senate and to the Committee on Interior and Insular Affairs of the United States House of

Representatives and not less than 30 nor more than 60 days shall be provided for the submittal of written comments on the proposed boundaries.

(d)(2) The proposed boundary and any comments received thereon shall be submitted to the Associated Director for National Register Programs, NPS, who may approve the boundary without reference to the Advisory Board or the Secretary.

(d)(3) NPS will provide written notice of the approved boundary to the same parties specified in subsection (d)(1) of this section and by publication in the Federal Register.

(d)(4) Management of the activities described in (d)(1), (2), and (3) is handled by the National Register of Historic Places, NPS, [Address: National Register of Historic Places, National Park Service, Department of the Interior, Washington, DC 20240].

(e) A technical correction to a boundary may be approved by the Chief, History Division, without Advisory Board review or Secretarial approval. NPS will provide notice, in writing, of any technical correction in a boundary to the same parties specified in (d)(1).

s 65.9 Withdrawal of National Landmark designation.

(a) National Historic Landmarks will be considered for withdrawal of designation only at the request of the owner or upon the initiative of the Secretary.

(b) Four justifications exist for the withdrawal of National Historic Landmark designation:

(b)(1) The property has ceased to meet the criteria for designation because the qualities which caused it to be originally designated have been lost or destroyed, or such qualities were lost subsequent to nomination, but before designation;

(b)(2) Additional information shows conclusively that the property does not possess sufficient significance to meet the National Historic Landmark criteria;

(b)(3) Professional error in the designation; and

(b)(4) Prejudicial procedural error in the designation process.

(c) Properties designated as National Historic Landmarks before December 13, 1980, can be dedesignated only on the grounds established in subsection (a)(1) of this section.

(d) The owner may appeal to have a property dedesignated by submitting a request for dedesignation and stating the grounds for the appeal as established in subsection (a) to the Chief, History Division, National Park Service, Department of the Interior, Washington, DC 20240. An appellant will receive a response within 60 days as to whether NPS considers the documentation sufficient to initiate a restudy of the landmark.

(e) The Secretary may initiate a restudy of a National Historic Landmark and subsequently a proposal for withdrawal of the landmark designation as appropriate in the same manner as a new designation as specified in s 65.5 (c) through (h). Proposals will not be submitted to the Advisory Board if the grounds for removal are procedural, although the Board will be informed of such proposals.

(f)(1) The property will remain listed in the National Register if the Keeper determines that it meets the National Register criteria for evalution in 36 CFR 60.4, except if the property is redesignated on procedural

grounds.

(f)(2) Any property from which designation is withdrawn because of a procedural error in the designation process shall automatically be considered eligible for inclusion in the National Register as a National Historic Landmark without further action and will be published as such in the Federal Register.

(g)(1) The National Park Service will provide written notice of the withdrawal of a National Historic Landmark designation and the status of the National Register listing, and a copy of the report on which those actions are based to (i) the owner(s); (ii) the appropriate State official; (iii) the chief elected local official; (iv) the Members of Congress who represent the district and State in which the landmark is located; and (v) if the landmark is located on an Indian reservation, the chief executive officer of the Indian tribe. In the case of a landmark with more than 50 owners, the general notice specified in s 65.5(d)(3) will be used.

(g)(2) Notice of withdrawal of designation and related National Register listing and determinations of eligibility will be published periodically in the Federal Register.

(h) Upon withdrawal of a National Historic Landmark designation, NPS will reclaim the certificate and plaque, if any, issued for that landmark.

(i) An owner shall not be considered as having exhausted administrative remedies with respect to dedesignation of a National Historic Landmark until after submitting an appeal and receiving a response from NPS in accord with these procedures.

s 65.10 Appeals for designation.

(a) Any applicant seeking to have a property designated a National Historic Landmark may appeal, stating the grounds for appeal, directly to the Director, National Park Service, Department of the Interior, Washington, DC 20240, under the following circumstances:
Where the applicant--

(a)(1) Disagrees with the initial decision of NPS that the property is not likely to meet the criteria of the National Historic Landmarks Program and will not be submitted to the Advisory Board; or

(a)(2) Disagrees with the decision of the Secretary that the property does not meet the criteria of the National Historic Landmarks Program.

(b) The Director will respond to the appellant within 60 days. After reviewing the appeal the Director may: (1) deny the appeal; (2) direct that a National Historic Landmark nomination be prepared and processed according to the regulations if this has not yet occurred; or (3) resubmit the nomination to the Secretary for reconsideration and final decision.

(c) Any person or organization which supports or opposes the consideration of a property for National Historic Landmark designation may submit an appeal to the Director, NPS, during the designation process either supporting or opposing the designation. Such appeals received by the Director before the study of the property or before its submission to the National Park System Advisory Board will be considered by the Director, the Advisory Board and the Secretary, as appropriate, in the designation process.

(d) No person shall be considered to have exhausted administrative remedies with respect to failure to designate a property a National Historic Landmark until he or she has complied with the procedures set forth in this section.
ADDITIONAL INFORMATION FROM WESTLAW

48 FR 4652-02
1983 WL 130898 (F.R.)
(Cite as: 48 FR 4652)
RULES and REGULATIONS

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 65

National Historic Landmarks Program

Wednesday, February 2, 1983

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: These regulations set forth the Secretary of the Interior's criteria for national significance and the process used to identify, designate, recognize and monitor the integrity of National Historic Landmarks. This final rule incorporates revisions required by the National Historic Preservation Act Amendments of 1980 Pub. L. 96-515 ("Amendments"), and updates and revises in other minor respects the National Historic Landmark procedures based in part on comments received in response to publication of prior regulations. The regulations make available to Federal agencies, State and local governments, private organizations, and individuals information necessary for understanding of and participation in the National Historic Landmarks Program.

DATES: Final rule effective February 2, 1983.

FOR FURTHER INFORMATION CONTACT: Edwin C. Bearss, Chief, History Division (202) 523-0089. Address: Chief, History Division, National Park Service, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The National Historic Landmarks Program, administered by the National Park Service, is the program of the Department of the Interior for identifying, designating, recognizing, listing, and monitoring National Historic Landmarks. Two offices in the national Park Service cooperate in managing the program: the Office of the Associate Director, Cultural Resources Management, through the History Division, manages the functions of identifying, designating and recognizing landmarks; the Office of the Associate Director for National Register Programs lists landmarks on the National Register of Historic Places and monitors their condition. The program provides limited protection to historic properties and assists the planning needs of Federal, State and local agencies and private organizations and individuals because it is the primary Federal means of assessing the national level of significance of historic properties, including those proposed for inclusion in the National Park System and for addition to the World Heritage List. Authority for the National Historic Landmarks Program is derived from the historic Sites Act of 1935 (49 Stat. 666, 16 U.S.C. 461 et seq.), which established a national policy to preserve "historic sites, buildings, and objects of national significance," and the National Historic Preservation Act Amendments of 1980 (Amendments).

Interim rules for the National Historic Landmarks Program were published in the Federal Register on December 18, 1979, 44 FR 74826, with a request for comments. The December 18, 1979 interim rules are

replaced by the final rules published today. Responses to the publication of the December 18, 1979 interim rules indicate the wide range of parties participating in the Landmarks Program, including State Historic Preservation Officers, other State and Federal agencies, university faculties, business firms, private organizations and individuals. On December 12, 1980, the Amendments became law necessitating revisions in the National Historic Landmark designation process. The Amendments require the Secretary of the Interior to promulgate or revise regulations for the following:

(a) Establishing and revising criteria for National Historic Landmarks;

(b) Designating properties as National Historic Landmarks and removing such designations;

(c) Considering appeals from such nominations, removals, and designations (or any failure or refusal by a nominating authority to nominate or designate);

(d) Notifying the owner of a property, appropriate local governments and the general public, when the property is being considered for designation as a National Historic Landmark;

(e) Notifying the owners of private property and providing them an opportunity (including a reasonable period of time) to concur in or object to the nomination of the property or district for designation;

(f) Reviewing the nomination of the property or district where any such objection has been made, determining whether or not the property or district is eligible for designation, and informing the Advisory Council on Historic Preservation, the appropriate State official, the appropriate chief elected local official and the owner or owners of such property of the Secretary's determination; and,

(g) In the case of National Historic Landmark districts for which no boundaries have been established, publishing proposed boundaries in the Federal Register and submitting them to the Committee on Energy and Natural Resources of the United States Senate and to the Committee on Interior and Insular Affairs of the United States House of Representatives.

The Amendments require the Secretary to send any proposed regulations published thereunder to the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the Senate before publication in the Federal Register for comment, and to send final regulations to Congress before publication.

In addition to the changes required by the Amendments, these final regulations reflect comments made in response to the December 18, 1979 interim regulations. Since the issuance of the December 18, 1979 interim regulations, the Heritage Conservation and Recreation Service (HCRS) has been abolished and the National Historic Landmarks Program transferred to the National Park Service (NPS). Comments received often refer to the Consulting Committee which was a review board proposed to examine and make professional recommendations to the Director (HCRS) and the Secretary of the Interior regarding the qualifications of nominated National Historic Landmarks. With the transfer of the program to the National Park Service, these regulations substitute the National Park System Advisory Board for the Consulting Committee.
Summary of comments and response to comments on the December 18, 1979 interim regulations:

One State urged that a specific system be established for nominations by State Historic Preservation Officers. The National Park Service also emphasized that National Historic Landmarks should be selected primarily on the basis of theme studies because of the importance of comparative analysis. Both of these concerns are incorporated into the priorities for selecting studies established in these regulations.

Several comments were received concerning the composition of the Consulting Committee and the role of the Committee. One comment suggested that designation by the Secretary without Consulting Committee review should be provisional and should require Committee concurrence within a specified period of time. Another comment recommended that the Committee include expertise in both historic and prehistoric archeology. As a result, the regulations have been made more specific concerning when and how the Secretary may designate National Historic Landmarks without National Park System Advisory Board review.

Several private companies expressed concerns about the effects of designation. One company interpreted the Historic Sites Act to mean that the Department of the Interior must obtain an interest in a property before designation. The Department does not agree with this interpretation of the act. The same company expressed concern that the owners were giving up some right in their property. Under Federal law, National Historic Landmark designation of a private property does not prohibit any actions which may otherwise be taken by the owner with respect to the property.

Others suggested that the role of the Director in the designation process should be clarified. This has been done in the regulations. One comment also urged that NPS should assure that all National Historic Landmark studies, public meetings, etc., should be carried out by NPS or with an NPS representative present. While this concern is not addressed in the regulations, NPS will assure that there is adequate NPS oversight of all aspects of the program.

One comment expressed concern that some aspects of the National Historic Landmark criteria are too broad, for example, the references to movements, ideals, beliefs and phenomena. The regulations make clear that the criteria are the general standards for evaluation of national significance; however, NPS emphasizes that the significance of each property must be evaluated on the basis of a thorough and detailed scholarly study.

The notification procedures before designation were the subject of a number of comments. One State Historic Preservation Officer recommended that State Historic Preservation Officers always participate in public meetings. Although this is not addressed in the regulations, NPS always welcomes State Historic Preservation Officers' participation in public meetings as well as in other aspects of the program.

Other comments recommended that additional parties be notified, as well as those included in the interim regulations. Because notice is costly, NPS can routinely notify only a certain number of parties as part of the nomination process.

A number of comments recommended revising the registration section. Some comments recommended that certificates be presented to all National Historic Landmarks. This has been included. Others recommended that plaques not be presented unless the recipients are willing to publicly display them. This has been included. Another comment questioned getting owners to sign a preservation agreement which is not binding. Based on these comments the registration aspect of the program has been substantially revised.

To fulfill the requirements of the Amendments and on the basis of the comments received on the December 18, 1979 interim regulations, substantive revisions have been made in the sections of the regulations listed below:

Section 65.2. A new section on the effects of designation has been added.

Section 65.4. The National Historic Landmark Criteria, Section 1205.9 in the December 18, 1979 interim rules (reprinted as 36 CFR Part 65 in 1981 to reflect the reorganization of HCRS into NPS) have been moved to a new position to emphasize their importance as the basis for all decisions on landmark designation. These criteria were revised following consultation with historical and archeological associations, the History

Areas Committee of the National Park System Advisory Board and the National Register. As a result, the revised criteria herein have been substituted for those of the 1979 rules. With some changes, these are the criteria used by the National Historic Landmarks Program before the 1979 rules. They are less cumbersome and more closely parallel with the criteria of the National Register (36 CFR Part 60).

Section 65.5. New language has been inserted to clarify the method and priorities used to identify prospective landmarks, to assure general understanding of how National Historic Landmark studies are scheduled, and to define the role of the appropriate State officials, Federal agencies and other parties in that process.
The Department receives numerous requests to designate properties as National Historic Landmarks from State officials, property owners and others. The requests to study and designate such properties far exceed the funds and staff available to the Department for the conduct of the program. National Historic Landmarks will, with rare exceptions, be identified on the basis of theme studies which provide the contextual framework to evaluate the relative significance of properties. The theme studies, which organize the study of American history, and special studies for properties not in active theme studies will be conducted according to priorities established herein.

State and Federal agencies evaluate, document, and nominate significant historic properties to the National Register of Historic Places, under the authorities of the National Historic Preservation Act of 1966, as amended, and Executive Order 11593. Their efforts are one basis for establishing National Historic Landmark Program priorities and assist in avoiding duplication of effort.

Section 65.5(c)(2). This paragraph has been modified to state that onsite visits will be required unless NPS determines such a visit is not necessary and to indicate that NPS may conduct a public information meeting for properties with more than 50 owners and will do so for such a property upon request by the chief elected official of the local, county or municipal political jurisdiction in which the property is located. This section also provides that properties on which the onsite visit was conducted before the effective date of these regulations are not subject to the notice provisions announcing that a study is being conducted.

Section 65.5(c)(4). New language has been added to identify minimum requirements for the study report or nomination for each prospective landmark.

Section 65.5(d)(5). This paragraph has been modified to provide owners an opportunity to concur in or object to designation and to specify how a statement of objection shall be transmitted to NPS.
Section 65.5(e)(2). New language has been added to provide that studies submitted to the Consulting Committee or National Park System Advisory Board before the effective date of these regulations need not be resubmitted to the National Park System Advisory Board. In such instances, if a property appears to qualify for designation, NPS will provide at least 30 days notice, a copy of the study report, and an opportunity to comment, and, for owners, an opportunity to concur in or object to the designation as specified in s 65.5(d) (2) and (3), before submitting a property to the Secretary for designation.

Section 65.5(e)(3). New language has been added to clarify the role of the Director in the evaluation and designation of landmarks.

Section 65.5(f). New language has been added to provide that if the owners of private property or for a district the majority of such owners have objected to the designation, the Secretary shall make a determination of a property's eligibility for National Historic Landmark designation, as required by the Amendments. The paragraph also establishes that the Keeper may list in the National Register properties considered for National Historic Landmark designation which do not meet the National Historic Landmark criteria but do meet the National Register criteria for State or local significance or determine such properties eligible for listing if the private owners or a majority of such owners object to listing.

Section 65.5(g). This paragraph describes the notices which NPS will provide concerning designations, determinations of eligibility for designation or other actions taken by the Secretary.
Section 65.5(h). New language has been added to clarify when the Secretary may designate National Historic Landmarks without review by the National Park System Advisory Board and to identify notification procedures and other procedural steps to be followed in the designation of landmarks without Advisory Board review.

Section 65.6. Landmark Registration has been redefined as Landmark Recognition; this change will eliminate potential confusion between "Registered" Landmarks and National Register properties.

Section 65.8(d)(1). A new provision is added that in the case of National Historic Landmark districts for which no boundaries have been established, proposed boundaries shall be published in the Federal Register for comment and submitted to the Committee on Energy and Natural Resources of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives to allow not less than 30 nor more than 60 days to comment on the proposed boundaries.

Section 65.9(a). New language expands the potential justification for withdrawals of landmark designation from three to four, including alternation of kind or degree of significance because of previously undiscovered information and reevaluation of the theme under which the designation was originally granted.

Section 65.9(b). This section specifies that properties designated as National Historic Landmarks before enactment of the Amendments, December 13, 1980, can only be redesignated if they have ceased to meet the criteria for designation because the qualities which caused them to be originally designated have been lost or destroyed. This provision is consistent with the Amendments' "grandfathering" all historic properties listed as National Historic Landmarks in the Federal Register of February 8, 1979 or thereafter prior to the effective date of the Amendments, and with the Congressional committee reports on the Amendments which recognize that the Secretary may dedesignate properties which have lost the historic qualities for which they were designated.

Section 65.9(c). A process is established for appeals for dedesignation.

Section 65.9(e). New language provides for possible continued National Register listing when a landmark designation is withdrawn and automatic National Register eligibility when designation is withdrawn because of procedural error.

Section 65.10. A new section has been added which establishes a formal process for appealing decisions not to designate a property a National Historic Landmark.

These substantive revisions are accompanied by minor changes in language throughout the regulations for purposes of clarity and consistency. The Department of the Interior emphasizes that the National Historic Landmark criteria constitute the standards against which all prospective landmarks are measured. These criteria do not contain a specific definition of significance. Instead, they are purposely worded to create a qualitative framework that can be applied to the wide variety of properties of national significance. The basis for designation of properties as landmarks is a scholarly, professional analysis of the historical documentation for each property and of the property's relative significance within a major field or theme of American history or prehistory.

The Department of the Interior has given particular attention to the need for expanded public participation in the National Historic Landmark designation process. Notification requirements have been set which will insure that property owners, appropriate State officials, local governments, Members of Congress, and other

interested parties will have ample opportunity to participate in the National Historic Landmarks Program.

Authority: This rulemaking is developed under the authority of the Historic Sites Act of 1935, 16 U.S.C. 461 et seq., and the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470 et seq.

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and does not have a significant economic effect on a substantial number of small entities in accordance with the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). These revisions are procedural, not substantive. They tell the public how properties are nominated for designation as National Historic Landmarks and because they are procedural only they have no significant economic effect on small entities.

Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C 3501 et seq.

Since this rule has to do only with the procedural aspects of the National Historic Landmarks Program and does not constitute a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act of 1969 an environmental impact statement is not required.

List of Subjects in 36 CFR Part 65

Historic preservation.

The originator of these procedures is Benjamin Levy, History Division, National Park Service.
Dated: October 19, 1982.

Ric Davidge, Acting Assistant Secretary, Fish and Wildlife and Parks.

(16 U.S.C. 461 et seq.: 16 U.S.C. 470 et seq.)

36 CFR 800

PART 800-PROTECTION OF HISTORIC AND CULTURAL PROPERTIES (1986)

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36 CFR 800: PART 800-PROTECTION OF HISTORIC AND CULTURAL PROPERTIES

Section 800.1 Authorities, purposes, and participants

Authority: Pub. L. 89-665, 80 Stat. 915 (16 U.S.C. 470), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978): E.O. 11593, 3 CFR 1971 Comp., p. 154.

Source: 51 FR 31118, Sept. 2, 1986, unless otherwise noted.

Subpart A-Background and Policy

Section 800.1 Authorities, purposes, and participants.

(a) Authorities. Section 106 of the National Historic Preservation Act requires a Federal agency head with jurisdiction over a Federal, federally assisted, or federally licensed undertaking to take into account the effects of the agency's undertaking on properties included in or eligible for the National Register of Historic Places and, prior to approval of an undertaking, to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. Section 110(f) of the Act requires that Federal agency heads, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking and, prior to approval of such undertaking, afford the Council a reasonable opportunity to comment. These regulations define the process used by a Federal agency to meet these responsibilities, commonly called the section 106 process.

(b) Purposes of the section 106 process. The Council seeks through the section 106 process to accommodate historic preservation concerns with the needs of Federal undertakings. It is designed to identify potential conflicts between the two and to help resolve such conflicts in the public interest. The Council encourages this accommodation through consultation among the Agency Official, the State Historic Preservation Officer, and other interested persons during the early stages of planning. The Council regards the consultation process as an effective means for reconciling the interests of the consulting parties. Integration of the section 106 process into the normal administrative process used by agencies for project planning ensures early, systematic consideration of historic preservation issues. To this end, the Council encourages agencies to examine their administrative processes to see that they provide adequately for the efficient identification and consideration of historic properties, that they provide for participation by the State Historic Preservation Officer and others interested in historic preservation, that they provide for timely requests for Council comment, and that they promote cost-effective implementation of the section 106 process. When impediments are found to exist in the agency's administrative process, the agency is encouraged to consult with the Council to develop special section 106 procedures suited to the agency's needs.

(c) Participants in the section 106 process-(1) Consulting parties. Consulting parties are the primary participants in the section 106 process whose responsibilities are defined by these regulations. Consulting parties may include:

(i) Agency Official. The Agency Official with jurisdiction over an undertaking has legal responsibility for complying with section 106. It is the responsibility of the Agency Official to identify and evaluate affected historic properties, assess an undertaking's effect upon them, and afford the Council its comment opportunity. The Agency Official may use the services of grantees, applicants, consultants, or designees to prepare the necessary information and analyses, but remains responsible for section 106 compliance. The

Agency Official should involve applicants for Federal assistance or approval in the section 106 process as appropriate in the manner set forth below.

(ii) State Historic Preservation Officer. The State Historic Preservation Officer coordinates State participation in the implementation of the National Historic Preservation Act and is a key participant in the section 106 process. The role of the State Historic Preservation Officer is to consult with and assist the Agency Official when identifying historic properties, assessing effects upon them, and considering alternatives to avoid or reduce those effects. The State Historic Preservation Officer reflects the interests of the State and its citizens in the preservation of their cultural heritage and helps the Agency Official identify those persons interested in an undertaking and its effects upon historic properties. When the State Historic Preservation Officer declines to participate or does not respond within 30 days to a written request for participation, the Agency Official shall consult with the Council, without the State Historic Preservation Officer, to complete the section 106 process. The State Historic Preservation Officer may assume primary responsibility for reviewing Federal undertakings in the State by agreement with the Council as prescribed in Section 800.7 of these regulations.

(iii) Council. The Council is responsible for commenting to the Agency Official on an undertaking that affects historic properties. The official authorized to carry out the Council's responsibilities under each provision of the regulations is set forth in a separate, internal delegation of authority.

(2) Interested persons. Interested persons are those organizations and individuals that are concerned with the effects of an undertaking on historic properties. Certain provisions in these regulations require that particular interested persons be invited to become consulting parties under certain circumstances. In addition, whenever the Agency Official, the State Historic Preservation Officer, and the Council, if participating, agree that active participation of an interested person will advance the objectives of section 106, they may invite that person to become a consulting party. Interested persons may include:

(i) Local governments. Local governments are encouraged to take an active role in the section 106 process when undertakings affect historic properties within their jurisdiction. When a local government has legal responsibility for section 106 compliance under programs such as the Community Development Block Grant Program, participation as a consulting party is required. When no such legal responsibility exists, the extent of local government participation is at the discretion of local government officials. If the State Historic Preservation Officer, the appropriate local government, and the Council agree, a local government whose historic preservation program has been certified pursuant to section 101(c)(1) of the Act may assume any of the duties that are given to the State Historic Preservation Officer by these regulations or that originate from agreements concluded under these regulations.

(ii) Applicants for Federal assistance, permits, and licenses. When the undertaking subject to review under section 106 is proposed by an applicant for Federal assistance or for a Federal permit or license, the applicant may choose to participate in the section 106 process in the manner prescribed in these regulations.

(iii) Indian tribes. The Agency Official, the State Historic Preservation Officer, and the Council should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties. When an undertaking will affect Indian lands, the Agency Official shall invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement. When an Indian tribe has established formal procedures relating to historic preservation, the Agency Official, State Historic Preservation Officer, and Council shall, to the extent feasible, carry out responsibilities under these regulations consistent with such procedures. An Indian tribe may participate in activities under these regulations in lieu of the State Historic Preservation Officer with respect to undertakings affecting its lands, provided the Indian tribe so requests, the State Historic Preservation Officer concurs, and the Council finds that the Indian tribe's procedures meet the purposes of these regulations. When an undertaking may affect properties of historic value to an Indian tribe on non-Indian lands, the

consulting parties shall afford such tribe the opportunity to participate as interested persons. Traditional cultural leaders and other Native Americans are considered to be interested persons with respect to undertakings that may affect historic properties of significance to such persons.

(iv) The public. The Council values the views of the public on historic preservation questions and encourages maximum public participation in the section 106 process. The Agency Official, in the manner described below, and the State Historic Preservation Officer should seek and consider the views of the public when taking steps to identify historic properties, evaluate effects, and develop alternatives. Public participation in the section 106 process may be fully coordinated with, and satisfied by, public participation programs carried out by Agency Officials under the authority of the National Environmental Policy Act and other pertinent statutes. Notice to the public under these statutes should adquately inform the public of preservation issues in order to elicit public views on such issues that can then be considered and resolved, when possible, in decisionmaking. Members of the public with interests in an undertaking and its effects on historic properties should be given reasonable opportunity to have an active role in the section 106 process.

Move to Section 2 of 36-CFR-800

Return to 36-CFR-800 menu

36 CFR 800: PART 800-PROTECTION OF HISTORIC AND CULTURAL PROPERTIES

Section 800.2 Definitions

Authority: Pub. L. 89-665, 80 Stat. 915 (16 U.S.C. 470), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978): E.O. 11593, 3 CFR 1971 Comp., p. 154.

Source: 51 FR 31118, Sept. 2, 1986, unless otherwise noted.

Section 800.2 Definitions.

(a) Act means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470-470w-6.

(b) Agency Official means the Federal agency head or a designee with authority over a specific undertaking, including any State or local government official who has been delegated legal responsibility for compliance with section 106 and section 110(f) in accordance with law.

(c) Area of potential effects means the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist.

(d) Council means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(e) Historic property means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. This term includes, for the purposes of these regulations, artifacts, records, and remains that are related to and located within such properties. The term eligible for inclusion in the National Register includes both properties formally determined as such by the Secretary of the Interior and all other properties that meet National Register listing criteria.

(f) Indian lands means all lands under the jurisdiction or control of an Indian tribe.

(g) Indian tribe means the governing body of any Indian tribe, band, nation, or other group that is recognized as an Indian tribe by the Secretary of the Interior and for which the United States holds land in trust or restricted status for that entity or its members. Such term also includes any Native village corporation, regional corporation, and Native Group established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1701, et seq.

(h) Interested person means those organizations and individuals that are concerned with the effects of an undertaking on historic properties.

(i) Local government means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(j) National Historic Landmark means a historic property that the Secretary of the Interior has designated a National Historic Landmark.

(k) National Register means the National Register of Historic Places maintained by the Secretary of the Interior.

(l) National Register Criteria means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(m) Secretary means the Secretary of the Interior.

(n) State Historic Preservation Officer means the official appointed or designated pursuant to section 101(b)(1) of the Act to administer the State historic preservation program or a representative designated to act for the State Historic Preservation Officer.

(o) Undertaking means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106.

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Section 800.3 General

Subpart B-The Section 106 Process

(a) Scope. The procedure in this subpart guides Agency Officials, State Historic Preservation Officers, and the Council in the conduct of the section 106 process. Alternative methods of meeting section 106 obligations are found in Section 800.7, governing review of undertakings in States that have entered into agreements with the Council for section 106 purposes, and Section 800.13, governing Programmatic Agreements with Federal agencies that pertain to specific programs or activities. Under each of these methods, the Council encourages Federal agencies to reach agreement on developing alternatives or measures to avoid or reduce effects on historic properties that meet both the needs of the undertaking and preservation concerns.

(b) Flexible application. The Council recognizes that the procedures for the Agency Official set forth in these regulations may be implemented by the Agency Official in a flexible manner relfecting differing program requirements, as long as the purposes of section 106 of the Act and these regulations are met.

(c) Timing. Section 106 requires the Agency Official to complete the section 106 process prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license or permit. The Council does not interpret this language to bar an Agency Official from expending funds on or authorizing nondestructive planning activities preparatory to an undertaking before complying with section 106, or to prohibit phased compliance at different stages in planning. The Agency Official should ensure that the section 106 process is initiated early in the planning stages of the undertaking, when the widest feasible range of alternatives is open for consideration. The Agency Official should establish a schedule for completing the section 106 process that is consistent with the planning and approval schedule for the undertaking.

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Section 800.4 Identifying historic properties

(a) Assessing information needs. (1) Following a determination by the Agency Official that a proposed project, activity, or program constitutes an undertaking and after establishing the undertaking's area of potential effects, the Agency Official shall:

(i) Review existing information on historic properties potentially affected by the undertaking, including any data concerning the likelihood that undentified historic properties exist in the area of potential effects;

(ii) Request the views of the State Historic Preservation Officer on further actions to identify historic properties that may be affected; and

(iii) Seek information in acordance with agency planning processes from local governments, Indian tribes, public and private organizations, and other parties likely to have knowledge of or concerns with historic properties in the area.

(2) Based on this assessment, the Agency Official should determine any need for further actions, such as field surveys and predictive modeling, to identify historic properties.

(b) Locating historic properties. In consultation with the State Historic Preservation Officer, the Agency Official shall make a reasonable and good faith effort to identify historic properties that may be affected by the undertaking and gather sufficient information to evaluate the eligibility of these properties for the National Register. Efforts to identify historic properties should follow the Secretary's ``Standards and Guidelines for Archeology and Historic Preservation'' (48 FR 44716) and agency programs to meet the requirements of section 110(a)(2) of the Act.

(c) Evaluating historical significance. (1) In consultation with the State Historic Preservation Officer and following the Secretary's Standards and Guidelines for Evaluation, the Agency Official shall apply the National Register Criteria to properties that may be affected by the undertaking and that have not been previously evaluated for National Register eligibility. The passage of time or changing perceptions of significance may justify reevaluation of properties that were previously determined to be eligible or ineligible.

(2) If the Agency Official and the State Historic Preservation Officer agree that a property is eligible under the criteria, the property shall be considered eligible for the National Register for section 106 purposes.

(3) If the Agency Official and the State Historic Preservation Officer agree that the criteria are not met, the property shall be considered not eligible for the National Register for section 106 purposes.

(4) If the Agency Official and the State Historic Preservation Officer do not agree, or if the Council or the Secretary so request, the Agency Official shall obtain a determination from the Secretary of the Interior pursuant to the applicable National Park Service regulations.

(5) If the State Historic Preservation Officer does not provide views, then the State Historic Preservation Officer is presumed to agree with the Agency Official's determination for the purpose of this subsection.

(d) When no historic properties are found. If the Agency Official determines in accordance with Section 800.4 paragraphs (a) through (c) that there are no historic properties that may be affected by the

undertaking, the Agency Official shall provide documentation of this finding to the State Historic Preservation Officer. The Agency Official should notify interested persons and parties known to be interested in the undertaking and its possible effects on historic properties and make the documentation available to the public. In these circumstances, the Agency Official is not required to take further steps in the section 106 process.

(e) When historic properties are found. If there are historic properties that the undertaking may affect, the Agency official shall assess the effects in accordance with Section 800.5.

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Section 800.5 Assessing effects

(a) Applying the Criteria of Effect. In consultation with the State Historic Preservation Officer, the Agency Official shall apply the Criteria of Effect (Section 800.9(a)) to historic properties that may be affected, giving consideration to the views, if any, of interested persons.

(b) When no effect is found. If the Agency Official finds the undertaking will have no effect on historic properties, the Agency Official shall notify the State Historic Preservation Officer and interested persons who have made their concerns known to the Agency Official and document the findings, which shall be available for public inspection. Unless the State Historic Preservation Officer objects within 15 days of receiving such notice, the Agency Official is not required to take any further steps in the section 106 process. If the State Historic Preservation Officer files a timely objection, then the procedures described in Section 800.5(c) are followed.

(c) When an effect is found. If an effect on historic properties is found, the Agency Official, in consultation with the State Historic Preservation Officer, shall apply the Criteria of Adverse Effect (Section 800.9(b)) to determine whether the effect of the undertaking should be considered adverse.

(d) When the effect is not considered adverse. (1) If the Agency Official finds the effect is not adverse, the Agency Official shall:

(i) Obtain the State Historic Preservation Officer's concurrence with the finding and notify and submit to the Council summary documentation, which shall be available for public inspection; or

(ii) Submit the finding with necessary documentation (Section 800.8(a)) to the Council for a 30-day review period and notify the State Historic Preservation Officer.

(2) If the Council does not object to the finding of the Agency Official within 30 days of receipt of notice, or if the Council objects but proposes changes that the Agency Official accepts, the Agency Official is not required to take any further steps in the section 106 process other than to comply with any agreement with the State Historic Preservation Officer or Council concerning the undertaking. If the Council objects and the Agency Official does not agree with changes proposed by the Council, then the effect shall be considered as adverse.

(e) When the effect is adverse. If an adverse effect on historic properties is found, the Agency Official shall notify the Council and shall consult with the State Historic Preservation Officer to seek ways to avoid or reduce the effects on historic properties. Either the Agency Official or the State Historic Preservation Officer may request the Council to participate. The Council may participate in the consultation without such a request.

(1) Involving interested persons. Interested persons shall be invited to participate as consulting parties as follows when they so request:

(i) The head of a local government when the undertaking may affect historic properties within the local government's jurisdiction;

(ii) The representative of an Indian tribe in accordance with Section 800.1(c)(2)(iii);

(iii) Applicants for or holders of grants, permits, or licenses, and owners of affected lands; and

(iv) Other interested persons when jointly determined appropriate by the Agency Official, the State Historic Preservation Officer, and the Council, if participating.

(2) Documentation. The Agency Official shall provide each of the consulting parties with the documentation set forth in Section 800.8(b) and such other documentation as may be developed in the course of consultation.

(3) Informing the public. The Agency Official shall provide an adequate opportunity for members of the public to receive information and express their views. The Agency Official is encouraged to use existing agency public involvement procedures to provide this opportunity. The Agency Official, State Historic Preservation Officer, or the Council may meet with interested members of the public or conduct a public information meeting for this purpose.

(4) Agreement. If the Agency Official and the State Historic Preservation Officer agree upon how the effects will be taken into account, they shall execute a Memorandum of Agreement. When the Council participates in the consultation, it shall execute the Memorandum of Agreement along with the Agency Official and the State Historic Preservation Officer. When the Council has not participated in consultation, the Memorandum of Agreement shall be submitted to the Council for comment in accordance with Section 800.6(a). As appropriate, the Agency Official, the State Historic Preservation Officer, and the Council, if participating, may agree to invite other consulting parties to concur in the agreement.

(5) Amendments. The Agency Official, the State Historic Preservation Officer, and the Council, if it was a signatory to the original agreement, may subsequently agree to an amendment to the Memorandum of Agreement. When the Council is not a party to the Memorandum of Agreement, or the Agency Official and the State Historic Preservation Officer cannot agree on changes to the Memorandum of Agreement, the proposed changes shall be submitted to the Council for comment in accordance with Section 800.6.

(6) Ending consultation. The Council encourages Agency Officials and State Historic Preservation Officers to utilize the consultation process to the fullest extent practicable. After initiating consultation to seek ways to reduce or avoid effects on historic properties, State Historic Preservation Officer, the Agency Official, or the Council, at its discretion, may state that further consultation will not be productive and thereby terminate the consultation process. The Agency Official shall then request the Council's comments in accordance with Section 800.6(b) and notify all other consulting parties of its requests.

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Section 800.6 Affording the Council an opportunity to comment

(a) Review of a Memorandum of Agreement. (1) When an Agency Official submits a Memorandum of Agreement accompanied by the documentation specified in Section 800.8 (b) and (c), the Council shall have 30 days from receipt to review it. Before this review period ends, the Council shall:

(i) Accept the Memorandum of Agreement, which concludes the section 106 process, and informs all consulting parties; or

(ii) Advise the Agency Official of changes to the Memorandum of Agreement that would make it acceptable; subsequent agreement by the Agency Official, the State Historic Preservation Officer, and the Council concludes the section 106 process; or

(iii) Decide to comment on the undertaking, in which case the Council shall provide its comments within 60 days of receiving the Agency Official's submission, unless the Agency Official agrees otherwise.

(2) If the Agency Official, the State Historic Preservation Officer, and the Council do not reach agreement in accordance with Section 800.6(a)(1)(ii), the Agency Official shall notify the Council, which shall provide its comments within 30 days of receipt of notice.

(b) Comment when there is no agreement. (1) When no Memorandum of Agreement is submitted, the Agency Official shall request Council comment and provide the documentation specified in Section 800.8(d). When requested by the Agency Official, the Council shall provide its comments within 60 days of receipt of the Agency Official's request and the specified documentation.

(2) The Agency Official shall make a good faith effort to provide reasonably available additional information concerning the undertaking and shall assist the Council in arranging an onsite inspection and public meeting when requested by the Council.

(3) The Council shall provide its comments to the head of the agency requesting comment. Copies shall be provided to the State Historic Preservation Officer, interested persons, and others as appropriate.

(c) Response to Council comment. (1) When a Memorandum of Agreement becomes final in accordance with Section 800.6(a)(1) (i) or (ii), the Agency Official shall carry out the undertaking in accordance with the terms of the agreement. This evidences fulfillment of the agency's section 106 responsibilities. Failure to carry out the terms of a Memorandum of Agreement requires the Agency Official to resubmit the undertaking to the Council for comment in accordance with Section 800.6.

(2) When the Council had commented pursuant to Section 800.6(b), the Agency Official shall consider the Council's comments in reaching a final decision on the proposed undertaking. The Agency Official shall report the decision to the Council, and if possible, should do so prior to initiating the undertaking.

(d) Foreclosure of the Council's opportunity to comment. (1) The Council may advise an Agency Official that it considers the agency has not provided the Council a reasonable opportunity to comment. The decision to so advise the Agency Official will be reached by a majority vote of the Council or by a majority vote of a panel consisting of three or more Council members with the concurrence of the Chairman.

(2) The Agency Official will be given notice and a reasonable opportunity to respond prior to a proposed Council determination that the agency has foreclosed the Council's opportunity to comment.

(e) Public requests to the Council. (1) When requested by any person, the Council shall consider an Agency Official's finding under Sections 800.4(b), 800.4(c), 800.4(d), or 800.5(b), and, within 30 days of receipt of the request, advise the Agency Official, the State Historic Preservation Officer, and the person making the request of its views of the Agency Official's finding.

(2) In light of the Council views, the Agency Official should reconsider the finding. However, an inquiry to the Council will not suspend action on an undertaking.

(3) When the finding concerns the eligibility of a property for the National Register, the Council shall refer the matter to the Secretary.

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Section 800.7 Agreements with States for section 106 reviews

[51 FR 31118, Sept. 2, 1986; 52 FR 25376, July 7, 1987]

(a) Establishment of State agreements. (1) Any State Historic Preservation Officer may enter into an agreement with the Council to substitute a State review process for the procedures set forth in these regulations, provided that:

(i) The State historic preservation program has been approved by the Secretary pursuant to section 101(b)(1) of the Act; and

(ii) The Council, after analysis of the State's review process and consideration of the views of Federal and State agencies, local governments, Indian tribes, and the public, determines that the State review process is at least as effective as, and no more burdensome than, the procedures set forth in these regulations in meeting the requirements of section 106.

(2) The Council, in analyzing a State's review process pursuant to Section 800.7(a)(1)(ii), shall:

(i) Review relevant State laws, Executive orders, internal directives, standards, and guidelines;

(ii) Review the organization of the State's review process;

(iii) Solicit and consider the comments of Federal and State agencies, local governments, Indian tribes, and the public;

(iv) Review the results of program reviews carried out by the Secretary; and

(v) Review the record of State participation in the section 106 process.

(3) The Council will enter into an agreement with a State under this section only upon determining, at minimum, that the State has a demonstrated record of performance in the section 106 process and the capability to administer a comparable process at the State level.

(4) A State agreement shall be developed through consultation between the State Historic Preservation Officer and the Council and concurred in by the Secretary before submission to the Council for approval. The Council may invite affected Federal and State agencies, local governments, Indian tribes, and other interested persons to participate in this consultation. The agreement shall:

(i) Specify the historic preservation review process employed in the State, showing that this process is at least as effective as, and no more burdensome than, that set forth in these regulations;

(ii) Establish special provisions for participation of local governments or Indian tribes in the review of undertakings falling within their jurisdiction, when appropriate;

(iii) Establish procedures for public participation in the State review process;

(iv) Provide for Council review of actions taken under its terms, and for appeal of such actions to the Council;

and

(v) Be certified by the Secretary as consistent with the Secretary's Standards and Guidelines for Archaeology and Historic Preservation.

(5) Upon concluding a State agreement, the Council shall publish notice of its execution in the Federal Register and make copies of the State agreement available to all Federal agencies.

(b) Review of undertakings when a State agreement is in effect. (1) When a State agreement under Section 800.7(a) is in effect, an Agency Official may elect to comply with the State review process in lieu of compliance with these regulations.

(2) At any time during review of an undertaking under a State agreement, an Agency Official may terminate such review and comply instead with Sections 800.4 through 800.6 of these regulations.

(3) At any time during review of an undertaking under a State agreement, the Council may participate. Participants are encouraged to draw upon the Council's expertise as appropriate.

(c) Monitoring and termination of State agreements. (1) The Council shall monitor activities carried out under State agreements, in coordination with the Secretary of the Interior's approval of State programs under section 101(b)(1) of the Act. The Council may request that the Secretary monitor such activities on its behalf.

(2) The Council may terminate a State agreement after consultation with the State Historic Preservation Officer and the Secretary.

(3) A State agreement may be terminated by the State Historic Preservation Officer.

(4) When a State agreement is terminated pursuant to Section 800.7(c) (2) and (3), such termination shall have no effect on undertakings for which review under the agreement was complete or in progress at the time the termination occurred.

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Section 800.8 Documentation requirements

(a) Finding of no adverse effect. The purpose of this documentation is to provide sufficient information to explain how the Agency Official reached the finding of no adverse effect. The required documentation is as follows:

(1) A description of the undertaking, including photographs, maps, and drawings, as necessary;

(2) A description of historic properties that may be affected by the undertaking;

(3) A description of the efforts used to identify historic properties;

(4) A statement of how and why the criteria of adverse effect were found inapplicable; and

(5) The views of the State Historic Preservation Officer, affected local governments, Indian tribes, Federal agencies, and the public, if any were provided, as well as a description of the means employed to solicit those views.

(b) Finding of adverse effect. The required documentation is as follows:

(1) A description of the undertaking, including photographs, maps, and drawings, as necessary;

(2) A description of the efforts to identify historic properties;

(3) A description of the affected historic properties, using materials already compiled during the evaluation of significance, as appropriate; and

(4) A description of the undertaking's effects on historic properties.

(c) Memorandum of Agreement. When a memorandum is submitted for review in accordance with Section 800.6(a)(1), the documentation, in addition to that specified in Section 800.8(b), shall also include a description and evaluation of any proposed mitigation measures or alternatives that were considered to deal with the undertaking's effects and a summary of the views of the State Historic Preservation Officer and any interested persons.

(d) Requests for comment when there is no agreement. The purpose of this documentation is to provide the Council with sufficient information to make an independent review of the undertaking's effects on historic properties as the basis for informed and meaningful comments to the Agency Official. The required documentation is as follows:

(1) A description of the undertaking, with photographs, maps, and drawings, as necessary;

(2) A description of the efforts to identify historic properties;

(3) A description of the affected historic properties, with information on the significant characteristics of each property;

(4) A description of the effects of the undertaking on historic properties and the basis for the determinations;

(5) A description and evaluation of any alternatives or mitigation measures that the Agency Official proposes for dealing with the undertaking's effects;

(6) A description of any alternatives or mitigation measures that were considered but not chosen and the reasons for their rejection;

(7) Documentation of consultation with the State Historic Preservation Officer regarding the identification and evaluation of historic properties, assessment of effect, and any consideration of alternatives or mitigation measures;

(8) A description of the Agency Official's efforts to obtain and consider the views of affected local governments, Indian tribes, and other interested persons;

(9) The planning and approval schedule for the undertaking; and

(10) Copies or summaries of any written views submitted to the Agency Official concerning the effects of the undertaking on historic properties and alternatives to reduce or avoid those effects.

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Section 800.9 Criteria of effect and adverse effect

(a) An undertaking has an effect on a historic property when the undertaking may alter characteristics of the property that may qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant depending on a property's significant characteristics and should be considered.

(b) An undertaking is considered to have an adverse effect when the effect on a historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on historic properties include, but are not limited to:

(1) Physical destruction, damage, or alteration of all or part of the property;

(2) Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register;

(3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;

(4) Neglect of a property resulting in its deterioration or destruction; and

(5) Transfer, lease, or sale of the property.

(c) Effects of an undertaking that would otherwise be found to be adverse may be considered as being not adverse for the purpose of these regulations:

(1) When the historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;

(2) When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected historic property through conformance with the Secretary's ``Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings'', or

(3) When the undertaking is limited to the transfer, lease, or sale of a historic property, and adequate restrictions or conditions are included to ensure preservation of the property's significant historic features.

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Section 800.10 Protecting National Historic Landmarks

Subpart C-Special Provisions

Section 110(f) of the Act requires that the Agency Official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in Sections 800.4 through 800.6 and give special consideration to protecting National Historic Landmarks as follows:

(a) Any consultation conducted under Section 800.5(e) shall include the Council;

(b) The Council may request the Secretary under section 213 of the Act to provide a report to the Council detailing the significance of the property, describing the effects of the undertaking on the property, and recommending measures to avoid, minimize, or mitigate adverse effects; and

(c) The Council shall report its comments, including Memoranda of Agreement, to the President, the Congress, the Secretary, and the head of the agency responsible for the undertaking.

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Section 800.11 Properties discovered during implementation of an undertaking

[51 FR 31118, Sept. 2, 1986; 52 FR 25376, July 7, 1987]

(a) Planning for discoveries. When the Agency Official's identification efforts in accordance with Section 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking, the Agency Official is encouraged to develop a plan for the treatment of such properties if discovered and include this plan in any documentation prepared to comply with Section 800.5.

(b) Federal agency responsibilities. (1) When an Agency Official has completed the section 106 process and prepared a plan in accordance with Section 800.11(a), the Agency Official shall satisfy the requirements of section 106 concerning properties discovered during implementation of an undertaking by following the plan.

(2) When an Agency Official has completed the section 106 process without preparing a plan in accordance with Section 800.11(a) and finds after beginning to carry out the undertaking that the undertaking will affect a previously unidentified property that may be eligible for inclusion in the National Register, or affect a known historic property in an unanticipated manner, the Agency Official shall afford the Council an opportunity to comment by choosing one of the following courses of action:

(i) Comply with Section 800.6;

(ii) Develop and implement actions that take into account the effects of the undertaking on the property to the extent feasible and the comments from the State Historic Preservation Officer and the Council pursuant to Section 800.11(c); or

(iii) If the property is principally of archeological value and subject to the requirements of the Archeological and Historic Preservation Act, 16 U.S.C. 469(a)-(c), comply with that Act and implementing regulations instead of these regulations.

(3) Section 106 and these regulations do not require the Agency Official to stop work on the undertaking. However, depending on the nature of the property and the undertaking's apparent effects on it, the Agency Official should make reasonable efforts to avoid or minimize harm to the property until the requirements of this section are met.

(c) Council comments. (1) When comments are requested pursuant to Section 800.11(b)(2)(i), the Council will provide its comments in a time consistent with the Agency Official's schedule, regardless of longer time periods allowed by these regulations for Council review.

(2) When an Agency Official elects to comply with Section 800.11(b)(2) (ii), the Agency Official shall notify the State Historic Preservation Officer and the Council at the earliest possible time, describe the actions proposed to take effects into account, and request the Council's comments. The Council shall provide interim comments to the Agency Official within 48 hours of the request and final comments to the Agency Official within 30 days of the request.

(3) When an Agency Official complies with Section 800.11(b)(2)(iii), the Agency Official shall provide the

State Historic Preservation Officer an opportunity to comment on the work undertaken and provide the Council with a report on the work after it is undertaken.

(d) Other considerations. (1) When a newly discovered property has not previously been included in or determined eligible for the National Register, the Agency Official may assume the property to be eligible for purposes of section 106.

(2) When a discovery occurs and compliance with this section is necessary on lands under the jurisdiction of an Indian tribe, the Agency Official shall consult with the Indian tribe during implementation of this section's requirements.

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Section 800.12 Emergency undertakings

(a) When a Federal agency head proposes an emergency action and elects to waive historic preservation responsibilities in accordance with 36 CFR 78.3, the Agency Official may comply with the requirements of 36 CFR part 78 in lieu of these regulations. An Agency Official should develop plans for taking historic properties into account during emergency operations. At the request of the Agency Official, the Council will assist in the development of such plans.

(b) When an Agency Official proposes an emergency undertaking as an essential and immediate response to a disaster declared by the President or the appropriate Governor, and Section 800.12(a) does not apply, the Agency Official may satisfy section 106 by notifying the Council and the appropriate State Historic Preservation Officer of the emergency undertaking and affording them an opportunity to comment within seven days if the Agency Official considers that circumstances permit.

(c) For the purposes of activities assisted under title I of the Housing and Community Development Act of 1974, as amended, Section 800.12(b) also applies to an imminent threat to public health or safety as a result of natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or the State Historic Preservation Officer objects, the Agency Official shall comply with Sections 800.4 through 800.6.

(d) This section does not apply to undertakings that will not be implemented within 30 days after the disaster or emergency. Such undertakings shall be reviewed in accordance with Sections 800.4 through 800.6.

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Section 800.13 Programmatic Agreements

[51 FR 31118, Sept. 2, 1986; 52 FR 25376, July 7, 1987]

(a) Application. An Agency Official may elect to fulfill an agency's section 106 responsibilities for a particular program, a large or complex project, or a class of undertakings that would otherwise require numerous individual requests for comments through a Programmatic Agreement. Programmatic Agreements are appropriate for programs or projects:

(1) When effects on historic properties are similar and repetitive or are multi-State or national in scope;

(2) When effects on historic properties cannot be fully determined prior to approval;

(3) When non-Federal parties are delegated major decision making responsibilities;

(4) That involve development of regional or land-management plans; or

(5) That involve routine management activities at Federal installations.

(b) Consultation process. The Council and the Agency Official shall consult to develop a Programmatic Agreement. When a particular State is affected, the appropriate State Historic Preservation Officer shall be a consulting party. When the agreement involves issues national in scope, the President of the National Conference of State Historic Preservation Officers or a designated representative shall be invited to be a consulting party by the Council. The Council and the Agency Official may agree to invite other Federal agencies or others to be consulting parties or to participate, as appropriate.

(c) Public involvement. The Council, with the assistance of the Agency Official, shall arrange for public notice and involvement appropriate to the subject matter and the scope of the program. Views from affected units of State and local government, Indian tribes, industries, and organizations will be invited.

(d) Execution of the Programmatic Agreement. After consideration of any comments received and reaching final agreement, the Council and the Agency Official shall execute the agreement. Other consulting parties may sign the Programmatic Agreement as appropriate.

(e) Effect of the Programmatic Agreement. An approved Programmatic Agreement satisfies the Agency's section 106 responsibilities for all individual undertakings carried out in accordance with the agreement until it expires or is terminated.

(f) Notice. The Council shall publish notice of an approved Programmatic Agreement in the Federal Register and make copies readily available to the public.

(g) Failure to carry out a Programmatic Agreement. If the terms of a Programmatic Agreement are not carried out or if such an agreement is terminated, the Agency Official shall comply with Sections 800.4 through 800.6 with regard to individual undertakings covered by the agreement.

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36 CFR 800: PART 800-PROTECTION OF HISTORIC AND CULTURAL PROPERTIES

Section 800.14 Coordination with other authorities

To the extent feasible, Agency Officials, State Historic Preservation Officers, and the Council should encourage coordination of implementation of these regulations with the steps taken to satisfy other historic preservation and environmental authorities by:

(a) Integrating compliance with these regulations with the processes of environmental review carried out pursuant to the National Environmental Policy Act, and coordinating any studies needed to comply with these regulations with studies of related natural and social aspects;

(b) Designing determinations and agreements to satisfy the terms not only of section 106 and these regulations, but also of the requirements of such other historic preservation authorities as the Archeological and Historic Preservation Act, the Archeological Resources Protection Act, section 110 of the National Historic Preservation Act, and section 4(f) of the Department of Transportation Act, as applicable, so that a single document can be used for the purposes of all such authorities;

(c) Designing and executing studies, surveys, and other information-gathering activities for planning and undertaking so that the resulting information and data is adequate to meet the requirements of all applicable Federal historic preservation authorities; and

(d) Using established agency public involvement processes to elicit the views of the concerned public with regard to an undertaking and its effects on historic properties.

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36 CFR 800: PART 800-PROTECTION OF HISTORIC AND CULTURAL PROPERTIES

Section 800.15 Counterpart regulations

In consultation with the Council, agencies may develop counterpart regulations to carry out the section 106 process. When concurred in by the Council, such counterpart regulations shall stand in place of these regulations for the purposes of the agency's compliance with section 106.

36 CFR Ch. VIII (7-1-92 Edition) Advisory Council on Historic Preservation.

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Case 118

Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993).

The Abenaki Nation of Mississquoi, its tribal council, and several individuals challenged the Army Corps of Engineers' issuance of a general permit under the Clean Water Act necessary for the construction of a hydroelectric project in Vermont. In addition to the Corps permit, the project required a license from the Federal Energy Regulatory Commission (FERC). In order to avoid duplication of effort, the Corps and FERC established a system where FERC would assume the role of lead agency in conducting environmental reviews required by the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). To implement the system, the Corps developed a regional permit, known as GP 38, for hydroelectric development activities in the New England region. 805 F. Supp. at 237.

The Village of Swanton applied to FERC for a license for the hydroelectric project, and FERC conducted an environmental assessment (EA). Determining that licensing the project with certain conditions would have minimal impact on the environment, FERC consequently made a finding of no significant impact (FONSI). Conditions included plans to mitigate the loss of wetlands and to manage previously unrecorded archeological and historic sites discovered during construction. After reviewing the application and FERC's EA, the Corps determined that the project was eligible for the general permit.

Plaintiffs alleged several claims against the Corps. Challenging the validity of the general permit for the New England region, plaintiffs asserted that the Corps failed to comply with the Administrative Procedure Act (APA), NEPA, and its own regulations when it developed the permit. The court rejected the APA argument that the general permit was a rule requiring notice and comment, finding the permit decisionmaking proceeding more akin to an adjudication than a rulemaking. *Id.* at 240.

The court also found that the general permit was developed in accordance with NEPA requirements. The administrative record revealed that the Corps had conducted an EA prior to issuance of the general permit and, further, that the FONSI rendered an environmental impact statement (EIS) unnecessary. Moreover, the court determined that when the Corps reissued the general permit because it had expired, a new EA was not required. Although the Corps' regulations did not directly address requirements for reissuing existing permits, the court found that reissuing the permit was similar to extending an existing permit. In such cases, Corps regulations merely required public notice as long as no significant modifications in activity were contemplated. The original EA, when coupled with two statements of findings that the activities caused minimal environmental impacts and public notice, were all that was necessary in issuing and reissuing the general permit. *Id.* at 242.

In challenging the general permit, plaintiffs also alleged that they were not properly notified of the proposal. The court noted that the Corps properly provided notice of the proposal to municipalities, State agencies and officials, private organizations, and some individuals, but it was not obligated to directly notify the Abenaki Nation because it was not an Indian tribe recognized by the Bureau of Indian Affairs. *Id*.

Plaintiffs' next allegation focused on the specific permit authorization to the Village of Swanton. Generally, plaintiffs argued that defendants violated NEPA by not preparing an EIS. The court disagreed. It determined that it was appropriate to condition the permit on the mitigation plan proposed by the village and that the conditional permit obviated the need for an EIS because it reduced the impact of the project. *Id.* at 243-44. The court explained that the majority of courts have held that "mitigation measures are appropriately considered in determining whether a federal action will have a significant impact or not," even though a Council on Environmental Quality guidance document states that agencies should not rely on the possibility of mitigation to avoid an EIS. *Id* at 244.

Because there was substantial evidence that the mitigation measures in the instant case would minimize the adverse effects, the court found that the Corps decision not to conduct an EIS was not arbitrary or capricious. Further, the court opined that historic resources were properly considered by the Corps and mitigated by the general permit. The permit called for an archeological study, a report submitted to the State Historic Preservation Officer (SHPO), and consultation with the Advisory Council on Historic Preservation and the SHPO on resolution of adverse effects. Plaintiffs also challenged the authorization granted to the Village by alleging that the Corps failed to notify the public of the project. The court observed, however, that the Corps had given public notice when it issued GP 38, and once the Corps determined that the project was within the GP 38, no additional notice was required. *Id*. at 247.

Notice was also an issue under the NHPA claim. Plaintiffs alleged that the Corps failed to notify interested persons prior to authorizing the project and thus violated NHPA. However, the court determined that plaintiffs did not fall within the definition of interested persons because the Council's regulations include as interested persons those Indian tribes recognized by the Secretary of the Interior; the Abenaki Nation was not so recognized. *Id.* at 249-50 (citing 36 C.F.R. § 800.2(g), 800.5(e)(1)). Finding that plaintiffs were not interested persons as defined by the regulations, the court concluded that plaintiffs were not entitled to participate as consulting parties or receive documentation as part of the Section 106 process. *Id.* at 250. Significantly, the court held that, as members of the public, plaintiffs were entitled to receive information and express their views. *Id.* (citing 36 C.F.R. § 800.5(e)(3)). Indeed, the Corps met with representatives of the Abenaki Nation to hear their concerns about the effect of the project. The court determined that the Corps provided the Abenaki Nation, as members of the public, with proper notice and an opportunity to comment on the project.

In addition to the question of public notice, the court also examined whether the Corps adequately considered the effect of the project on historic properties as required by Section 106. As lead agency, FERC had made a finding of no adverse effect, in which the SHPO and the Council concurred, based on the mitigation plan that mandated avoidance and mitigation of impacts. Apparently, plaintiffs did not challenge this finding. However, plaintiffs claimed that the historic resources at the mitigation site were not properly considered. The court reviewed the administrative record and found that the Corps consulted with the SHPO, met with plaintiffs several times, and reached an agreement with the SHPO as to how to mitigate adverse effects if historic properties were discovered at the mitigation site. The SHPO's recommendations were incorporated into the authorization for the project as conditions, providing concrete procedures to follow if historic resources were discovered.

The court found that the Corps was "in technical violation of the NHPA," as it did not adhere to the Council's procedures by including its agreement with the SHPO in a Memorandum of Agreement. *Id.* at 251. However, the court nevertheless concluded that the Corps had fulfilled the intent of NHPA by reaching an agreement with the SHPO and conditioning the permit. The court noted that the Council's regulations allow that they be applied in a "flexible manner." *Id.* (quoting 36 C.F.R. § 800.3(b)).

The Abenaki Nation also alleged a violation under the Native American Graves Protection and Repatriation Act (NAGPRA). The court stated that NAGPRA applies to cultural and funerary objects already possessed or under the control of a Federal agency or those already discovered or excavated. *Id.* at 252. Because there had not yet been any items discovered at the site, the court found plaintiffs' claim premature. The court did note, however, that NAGPRA did not apply to the facts of the case because the site was not on Federal or tribal land. The court rejected plaintiffs' argument that the site should be considered Federal land because the Corps had the power to regulate it under the Clean Water Act and supervised the mitigation plan. Such a broad interpretation, reasoned the court, would require compliance with NAGPRA whenever the Government issued permits or provided Federal funding.

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Case 27

Ad Hoc Committee to Save the Old Carnegie Library Building v. City of Atlanta, No. C77-541A (N.D. Ga. Apr. 7, 1977).

The city of Atlanta, Georgia, proposed to demolish the Carnegie Library and replace it with a new structure. The building was a National Historic Landmark listed in the National Register of Historic Places. In 1965, the city had received a Federal grant to remodel the old library from the Department of Health, Education, and Welfare (HEW) under the Library Services and Construction Act. Under the grant agreement, the city was required to use the building as a library for the life of the building. If the city were to cease using the building as a library, it would be required to reimburse the Federal Government. If the city were to sell the building, it would have to give the Federal Government a percentage of the proceeds. When HEW learned that the city proposed to demolish the library, it issued a legal opinion concluding that the market value of the building, and thus the Government's fair share, was zero and that there was no necessity for Federal accountability in the construction of the new building.

Plaintiffs‹library card holders and residents‹sought to enjoin demolition, asserting that HEW's opinion was a release by the Federal Government of its interest in the building and constituted sufficient Federal action to trigger the provisions of the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and Executive Order No. 11593.

First, the court determined that plaintiffs had standing to maintain the lawsuit. Not only were their interests in historic preservation within the zone of interests of NHPA and the Executive Order, but they had alleged sufficient injury-in-fact by stating that they were users of the library and their enjoyment of the library would be injured by its demolition. That a large population of citizens may incur the same injury cannot deny plaintiffs standing. Slip op. at 4.

The court disagreed with plaintiffs on the merits, however. Because HEW's regulations did not require the city to return the grant when a new building, dedicated to identical purposes, was to be constructed on the same site, the city could retain for the new building the equity represented by the Federal grant in the old building. The Federal Government would then have no legal interest in the old building. *Id.* at 6.

The court continued that even if the HEW legal opinion amounted to a release of the Federal interest, such a release would not be sufficient Federal involvement to invoke NHPA, NEPA, or Executive Order No. 11593, for "the plaintiffs here are simply spinning too gossamer a web of Federal involvement." *Id.*

The court denied plaintiffs' motion for preliminary injunction and granted defendants' motion to dismiss for failure to state a claim. *Id*.

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Case 49

Aertson v. Landrieu, 488 F. Supp. 314 (D. Mass.), *aff'd*, 637 F.2d 12 (1st Cir. 1980).

Plaintiffs alleged that the Department of Housing and Urban Development (HUD) had not complied with the National Historic Preservation Act (NHPA) or the National Environmental Policy Act (NEPA) in funding a housing project that involved demolition of buildings located in and adjacent to the South End Historic District, an area listed in 1973 in the National Register of Historic Places. The court had enjoined the project in 1979, ordering HUD to expand the scope of the special environmental clearance it had prepared. When HUD had completed the revised clearance, defendants moved to vacate the injunction.

The first issue that the court addressed involved seven buildings situated outside but close to the historic district. Plaintiffs, residents of the area, asserted that the buildings were eligible for inclusion in the Register.

The court examined correspondence between HUD and the State Historic Preservation Officer (SHPO) that reflected HUD's and the SHPO's opinion that these seven buildings were not included in the historic district because they lacked historic significance.

Because HUD and the SHPO had agreed, pursuant to Section 800.4(a)(3) of the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA, that the buildings did not meet the criteria for eligibility for the Register, HUD had completed no further review with regard to these buildings. The court upheld HUD's action. 488 F. Supp. at 318.

Second, HUD, in consultation with the SHPO, had determined that the project would have no adverse effect on the historic district and so advised the Council, as required by Section 800.4(c) of the Council's regulations. The Council concurred. The court found that HUD's determination of no adverse effect was not arbitrary or capricious. *Id.* at 319.

Third, the court stated that HUD's failure to mention specifically the proposed demolition of the buildings adjacent to the historic district in seeking the Council's concurrence on HUD's determination of no adverse effect did not invalidate the Council's concurrence. The evidence showed that the Council was aware of the proposed demolition and considered it in concurring. The court added that even if the Council had not been aware of the proposed demolition, not every deviation from proper procedures would justify an injunction or invalidate otherwise proper review under Section 106 of NHPA. *Id.* at 319-20.

Fourth, the court rejected plaintiffs' claims that HUD's documentation of its determination of no adverse effect was inadequate under Section 800.13 of the Council's regulations. Noting that the Council did not object to the documentation, the court found that any noncompliance was not so material as to require additional Section 106 review. *Id.* at 320.

Fifth, plaintiffs complained that they had not been allowed to participate in the Section 106 review process. The court held that public participation in the Section 106 process, although desirable, was not mandatory under NHPA or Section 800.15 of the Council's regulations. *Id*.

Finally, the court rejected plaintiffs' arguments that HUD was required to prepare an environmental impact statement on the project under NEPA. HUD had prepared and supplemented a special environmental clearance in which it concluded that the project was not a major Federal action. These documents included a discussion of the historic district and the impact of the buildings' demolition. *Id.* at 322. HUD's determination not to prepare an environmental impact statement was reasonable.

The district court vacated its previously issued injunction and dismissed the case. *Id.* at 324. The First Circuit affirmed, without addressing the historic preservation issues. 637 F.2d at 24.

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Case 42

Aluli v. Brown, 437 F. Supp. 602 (D. Haw. 1977), *aff'd in part, rev'd in part*, 602 F.2d 876 (9th Cir. 1979).

Plaintiffs sought to enjoin the Navy's bombing activities on the Island of Kahoolawe, Hawaii, alleging that the Navy had violated the National Environmental Policy Act (NEPA) by failing to prepare a supplemental environmental impact statement with its annual appropriation request to fund the bombing operations and had violated the National Historic Preservation Act (NHPA) and Executive Order No. 11593 by authorizing the bombing without locating, inventorying, or nominating to the National Register of Historic Places all historic properties on the island that appeared to meet the National Register criteria. An archeological survey done in 1931 had identified 50 sites on the island. The Navy's environmental impact statement (EIS), prepared under NEPA in 1972, discussed these sites and had been upheld in a separate court challenge.

Since the Navy had filed its initial environmental impact statement, it had commissioned further surveys, and additional archeological resources had been discovered on the island. Because these surveys were ongoing, the Navy did not intend to offer any sites for nomination to the Register until surveys of the entire island had been completed. Nevertheless, the Navy had taken precautions to prevent damage to the identified sites. Defendant argued that a supplemental EIS was not required, that NHPA did not apply because the island had not been determined eligible for inclusion in the Register, and that Executive Order No. 11593 did not provide a right of action within the district court's jurisdiction.

The district court concluded that NHPA applied to the defendant and that plaintiffs had an implied right of action under NHPA and Executive Order No. 11593. 437 F. Supp. at 609. Although the court declined to enjoin defendant from bombing because plaintiffs had not shown that they would be irreparably injured by continued bombing, it found defendant to be in violation of the Executive Order. It required defendant to cooperate with the State Historic Preservation Officer in surveying the island, to refer any bombing activities that might damage prospective historic sites to the Secretary of the Interior for an opinion respecting the properties' eligibility for inclusion in the National Register without waiting for completion of the survey, and to seek an eligibility determination for the entire island. *Id.* at 612. These findings were not overturned on appeal.

The district court also held that defendant's bombing of the archeological sites was a major Federal action under NEPA and that, because of the presence of the newly discovered archeological sites on the island, the Navy had to prepare a new or revised EIS. The new EIS must consider the possible effects of the use of live ordnance on the historic and cultural resources on the island. *Id.* at 607-08. The district court concluded that the Navy must prepare an annual EIS as long as the bombing activities continued. *Id.* at 612. The Ninth Circuit reversed the district court's requirement of an annual EIS, holding that the Navy's annual requests for appropriations to fund the bombing activities were not "proposals" under NEPA. 602 F.2d at 877.

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Case 140

***American Institute of Architects v. City of Columbus,* 1998 WL 340445 (S.D. Ohio Jan. 16, 1998); No. C 2-98-048.**

The district court denied plaintiff, the Columbus Chapter of the American Institute of Architects (AIA), motion for a temporary restraining order to prevent demolition of a historic State penitentiary in Columbus, Ohio. The court ruled that it lacked jurisdiction to prevent defendant, the City of Columbus, from proceeding with the demolition because plaintiff failed to demonstrate a "likelihood of success on the merits." The court further concluded that the hardship to the city outweighed any hardship to plaintiff.

In finding that there was no jurisdiction in this case, the court concluded that neither Section 106 of the National Historic Preservation Act (NHPA), nor a Memorandum of Agreement (MOA) executed by the city and the Advisory Council on Historic Preservation, could be invoked to obtain jurisdiction. Section 106 did not apply because AIA failed to establish the presence of a "Federal undertaking." Plaintiff was unable to prove that the city had either requested or expended any Federal funds for the penitentiary demolition. It had merely proposed their use in the planning process.

The court also stated that the executed MOA could not be used to establish jurisdiction. It reasoned that previous courts had found that such memoranda "have no binding effect on the parties unless there exists a 'Federal undertaking,'" and the "obligation itself assumed by the city in the MOA is not sufficient to satisfy the threshold requirement of an 'undertaking.'" 1998 WL 340445, 2.

The court then looked at the issue of irreparable harm in its decision to deny the injunction. While the court acknowledged that AIA would suffer great injury if injunctive relief was not granted, it nonetheless concluded that "the hardship to the city outweighed any hardship visited upon the plaintiffs." *Id.* Finally, the court stated that the public interest lay in favor of the decision to demolish since the city's representatives had supported such a decision.

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Case 125

Apache Survival Coalition v. United States, 21 F. 3d 895 (9th Cir. 1994).

Proposed construction of an observatory complex on Mount Graham in Arizona, the location of several Native American shrines eligible for the National Register of Historic Places, led the Apache Survival Coalition to sue the United States Forest Service alleging that it did not properly comply with the National Historic Preservation Act (NHPA). Prior to approving the construction project, the Forest Service had prepared an environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA) and initiated the Section 106 review process in accordance with NHPA. The court, however, did not reach the issue of NHPA compliance because it found plaintiffs' claim to be barred by the doctrine of laches.

In NEPA cases, courts generally apply a more lenient standard when determining whether laches should bar a claim. The court found that the lenient standard should also prevail in NHPA cases where, like NEPA, suits are brought in the public interest and to ensure Federal agency compliance. 21 F.3d at 906. In applying the more lenient standard of laches, the court examined whether plaintiffs unduly delayed their suit and whether defendant would be unduly prejudiced if the suit were allowed to go forward. The court identified plaintiffs as representing the interests of the San Carlos Apache Tribe. Any notice to the Tribe, therefore, constituted notice to plaintiffs. The Forest Service had solicited the Apache Tribe's views regarding cultural resources six years before the lawsuit was initiated, but the Tribe did not express concerns over the resources at that time. The Tribe failed to comment on the draft EIS and several years later asked to be taken off the mailing list for the final EIS. Notwithstanding that request, the Forest Service sent the Tribe a final EIS. The Tribe did not comment.

The court decided that the onset of the NHPA review process, rather than the date of permit issuance, was the appropriate date from which to measure laches. *Id.* at 907. Had the Tribe participated in the NHPA review process, the court pointed out, it could have corrected the deficiencies in the process it now alleged. *Id.* at 908. In finding unreasonable delay in bringing the suit, the court did note that before filing suit, but after the permit was issued, the Tribe attempted to communicate its views. Specifically, the Tribe expressed its concerns to the University of Arizona, which was working with the Forest Service on the project. Additionally, one year after construction began, the Tribe wrote the Forest Service directly. The Forest Service was willing to consider information on mitigation options, but the Tribe did not respond until another year had elapsed and, at that time, reiterated its earlier concerns without offering mitigation information. Once again, the Forest Service agreed to hear the Tribe's views, but received no response.

The court found that these communications did not preclude a finding of unreasonable delay because the Tribe had ignored the early notifications about the project, failed to sue until more than two years after permit issuance, and ignored Forest Service attempts to respond to Tribal concerns expressed after issuance of the permit. *Id.* at 909.

Another factor considered by the court in determining inexcusable delay was the scope of the NHPA claim. If the claim included violations of ongoing duties after the permit was issued, the above analysis of delay would not apply. Although plaintiffs' complaint was limited to a challenge of the Forest Service's actions leading up to the permit issuance, plaintiffs raised the issue of defendant's "ongoing obligation" with regard to the project in their opposition to defendants' motion for summary judgment.

The court interpreted the Council's regulations as imposing a continuing duty upon Federal agencies to comply with the Section 106 process when previously unidentified eligible properties are discovered, phased compliance is contemplated, or a modification occurs in the project where the Federal agency still has power to authorize the modification. *Id.* at 911. According to the court, plaintiffs' allegations in the opposition motion alleged previously unidentified properties with sufficient specificity to expand the scope of the case to the post-permit period. However, because the information on the properties would have been before the Forest Service if the Tribe had not "consistently ignored the NHPA process," the court found it inappropriate to treat the violation of an ongoing duty as separate from the original claim. A contrary finding, the court reasoned, would give a party an incentive to withhold information and

not engage in consultation with the hope of getting a second chance to prevent a project by bringing suit based on "new" information. *Id.* at 912.

With regard to the undue prejudice aspect of laches, the court considered that at the time the complaint was filed 35 percent of construction was complete and $4 million had been expended. By the time the motion for preliminary injunction was filed, expenditures had doubled and delay was estimated at $11,000 per day. The court noted that substantial completion is sometimes insufficient to bar suit, but in this case, the harm plaintiffs feared had become irreversible. *Id.* at 913. The court explained that NHPA does not mandate that projects be barred in areas where eligible historic properties exist, only that Federal agencies take into account the effect on such properties. *Id.* Finally, the court determined that the Arizona-Idaho Conservation Act (AICA), which authorized the ultimate construction of the complex, was passed for the very purpose of avoiding more delays. The court found that defendants would be prejudiced by allowing the suit to go forward at this stage.

Plaintiffs made a second argument regarding Forest Service actions, alleging that AICA violates the constitutional principle of separation of powers. Plaintiffs first alleged that by passing AICA, Congress had prescribed a rule of decision without changing the underlying laws. Concluding that Congress had indeed modified the old law by setting new standards and did not direct a particular result under old law, the court rejected plaintiffs' argument. *Id.* at 902. The court also rejected plaintiffs' allegations that AICA usurped the Forest Service's authority. According to the court, in passing AICA, Congress altered the reach of the law and changed the legal standard but left to the Forest Service the decision as to compliance with the new law.

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Case 138

Apache Survival Coalition v. United States, (Apache Survival II), 118 F.3d 663 (9th Cir. 1997).

Plaintiff, Apache Survival Coalition, sought to enjoin construction of the Mount Graham International Observatory, arguing that defendant, the U.S. Forest Service, failed to comply with the National Historic Preservation Act (NHPA). Up until this point, there had been an injunction in place from a suit brought by another group, Red Squirrel V, that sought the same injunction, but it had recently expired and construction was underway again.

As in Apache Survival I (see Case 125), the district court decided this case on the doctrine of laches. To establish the defense of laches, a party must show prejudice caused by the opposing party's lack of diligence in pursuing its claim. The court emphasized that the Coalition did not come forward with its claim at the same time Red Squirrel V sought its injunction, and instead waited two years until that injunction was dissolved. The court thought this especially inexcusable in light of the "strong wake-up call" of *Apache Survival I*, and it denied the injunction.

The Ninth Circuit began its discussion of the case by acknowledging that, like NEPA cases, NHPA cases require that laches be "invoked sparingly." Nevertheless, it proceeded to affirm the denial of the injunction.

In affirming the denial, the Ninth Circuit found the Coalition's argument that it had been attempting to use other routes of resolution (i.e. "administrative strategy") unconvincing. If the Coalition did in fact pursue its claims through an administrative strategy, mainly lobbying, there was little evidence of its efforts in the record. The court stated that the Coalition's tactical decisions were remarkably similar to that used in *Apache Survival I.* The tactic in those cases was to wait to bring suit until the challenges launched by other parties had failed. Further, the Coalition failed to explain how the three telescopes in their present configuration represent any greater desecration than they would have in their original, already approved, configuration.

The court remanded the case to the trial court and stated that if there is no additional or different proof, it is likely that the district court will find in favor of the Government. It did, however, state that nothing in this opinion is meant to discourage the Coalition from seeking the placement of Mount Graham on the National Register of Historic Places, which would alleviate many of the problems of outdated information and inadequate consultation presented here.

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Case 101

Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990).

Members of the Navajo tribe brought an action against the Department of Interior and the Bureau of Indian Affairs (BIA) to challenge the construction of fences and livestock watering facilities on portions of the Hopi Indian Reservation. Plaintiffs alleged that the construction activities disturbed and destroyed sites of religious, historical, and archeological significance in violation of the National Historic Preservation Act (NHPA), the Historic and Archeological Data Preservation Act (HADPA), the Archaeological Resources Protection Act (ARPA), the National Environmental Policy Act (NEPA) and the Administrative Procedure Act. Plaintiffs also raised the claim, under the First Amendment of the United States Constitution and the American Indian Religious Freedom Act (AIRFA), that construction activities interfered with their ability to practice their religion.

The dispute arose out of the Navajo-Hopi Land Settlement Act which provided for the relocation of members of the Navajo tribe who resided on lands the act had partitioned to the Hopi tribe. Most of the Navajo plaintiffs lived on Hopi lands located near the construction. The construction projects had the approval and cooperation of the Hopi tribe.

The court first addressed the question of whether the members of the Navajo tribe had standing to sue as individuals. It ruled that the Settlement Act broadly barred the right to private actions relating to the Navajo-Hopi dispute and thus found that individual Navajos did not have standing to challenge the denial of permits to graze on the land in question or to challenge the procedures associated with the relocation of the Navajos from the Hopi land. However, the court found that the individuals did have standing to assert their claims that defendants violated Federal statutes given that their interests in preservation of historical, archeological, and cultural artifacts were not necessarily the same as the tribe. The court also found that the Settlement Act did not bar the individuals from alleging a violation of the Free Exercise Clause of the First Amendment in so far as the construction infringed upon the individual's right to use sites of particular significance; plaintiffs did not have standing to assert the claim that the construction denied access to religious sites of significance to the tribe.

In addressing plaintiffs' First Amendment claim, the court relied on the United States Supreme Court decision in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). Following *Lyng*, the court found that even though the construction projects would "seriously interfere with" Navajo religious practices, the Free Exercise Clause did not prevent the Government from using the property as it needed. 746 F. Supp. at 1403. As support for its holding, the court cited *Lyng*'s argument that the Government "simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* (quoting *Lyng*, 485 U.S. at 452). The court also observed that the construction project at issue involved lands allocated to the Hopi tribe and under the directive of a statutorily mandated restoration and conservation program. Thus, the court did not find that the Government had to consult with plaintiffs to minimize harm to Navajo religious practices.

The court next addressed the claim that the Government's activity violated AIRFA. The court interpreted AIRFA as expressing a policy of protecting American Indians' rights to freely practice their religion, have access to sacred sites, and use sacred objects. According to the court, AIRFA's legislative history indicated that the intent of the law was to ensure that American Indians obtained First Amendment protection, "not to grant them rights in excess of those guarantees." *Id.* at 1405. Returning to the precedent of the *Lyng* case, the court stated that the statute did not create a cause of action in Federal court and, therefore, dismissed plaintiffs' claim under AIRFA.

The court, however, did find in favor of plaintiffs with respect to the Section 106 claim under NHPA, granting the motion for a preliminary injunction to enjoin Government construction activities. Under the NHPA claim, plaintiffs alleged that defendants failed to consult with the Advisory Council on Historic Preservation and the State Historic Preservation Officer (SHPO) during the project's planning and implementation. Specifically, plaintiffs asserted that defendants did not fulfill the identification requirements of 36 C.F.R. § 800.4(a)(1) which requires consultation with the SHPO.

Defendants argued that they substantially complied with the Section 106 regulations by conducting a field survey prior to final approval of the project. According to defendants, Section 800.4(a)(2) of the Council's regulations indicates that the purpose of the consultation requirements of 800.4(a)(1) is to determine the need for a survey. 746 F. Supp. at 1407. Because BIA had conducted a survey within and close to the project line, it alleged that it was in substantial compliance. The survey located historic properties and, as a result, the BIA archeologist recommended that portions of the project be moved to avoid any potential effect to the historic properties. The project was subsequently realigned, and BIA found it would have no effect. The archeologist testified that it was standard BIA practice to then send to the SHPO notification of a finding of no effect, but the SHPO had no record of such notification.

The district court found that defendants did not comply with the identification requirements of Section 800.4. According to the court, "the identification of historic properties that may be affected and the determination of the eligibility of these properties for inclusion in the National Register, is of considerable importance . . . ." *Id.* at 140. Moreover, absent consultation with the SHPO as required by Section 800.4(a)(1), the court found that the agency could have no reasonable basis to determine what further actions, aside from a survey, may be necessary in accordance with the provisions in Section 800.4(a)(2). *Id.* at 1407. Further, the court found that Section 800.4(b) explicitly requires identification of historic properties in consultation with the SHPO. *Id.*

The court also rejected defendants' argument that Section 800.3(b) allowed for flexible application of the Council's regulations and, thus, that BIA had substantially complied with the regulations by moving the projects away from the historic properties. *Id.* Finding that BIA procedures circumvented the consultative process, the court determined that BIA acted "contrary to the letter and spirit of the regulations" and, therefore, did not substantially comply with the regulations. *Id.* at 1408. The "unilateral determination" of the BIA archeologist to avoid the properties could not substitute for the consultative requirements embodied in Sections 800.4(a)-(c), even when the SHPO testified after the fact that avoidance of the properties may have been proper mitigation. *Id.* at 1407.

With regard to the Section 106 consultative requirements, plaintiffs also alleged that defendants failed to comply with the regulations because they did not consult with the Navajo tribe. Once again, the court noted that the Section 106 regulatory scheme depended on consultation with relevant persons in order to gather information necessary to identify and evaluate historic properties. *Id.* at 1408. The court turned to Section 800.1(c)(2)(iii) which addresses Indian tribes' participation in the Section 106 process. Reviewing the regulation, the court determined that it clearly requires an Indian tribe to participate as a consulting party when an undertaking affects tribal land. The present case involved Hopi, not Navajo, land, and BIA had received the Hopi tribe's concurrence in the project. However, the court determined that even though the Navajo tribe's concurrence in any agreement reached was not essential because the undertaking did not involve Navajo land, the Navajo still must be consulted as interested persons as dictated by Section 800.1(c)(2)(iii) in order to obtain adequate information regarding historic properties. *Id.*

The final argument under NHPA focused on the requirements of Section 110. Plaintiffs alleged that defendants failed to establish a program to inventory historic sites under their ownership or control. Defendants asserted that they did not have to comply with Section 110 with regard to Indian lands because the agency neither owned nor controlled the land. The court agreed with the defendants, finding that the Indian tribes owned and controlled Indian lands even though the Federal Government held the lands in question in trust. *Id.* at 1409. The court found nothing indicative in Section 110 of NHPA of an intent to apply Section 110 to Indian lands. Thus, the court denied the preliminary injunction with regard to Section 110 compliance.

The court dismissed plaintiffs' remaining arguments under other statutes. It found that the claim under the Historical and Archeological Data Preservation Act, which provides protection to significant data discovered during construction, was inappropriate because plaintiffs did not show that the defendants found, during their construction activities, significant data requiring a survey or further investigation. 746 F. Supp. at 1410. With respect to the ARPA claim, the court found that it was inapplicable to the current case because ARPA applied to purposeful excavation and removal of archeological resources, not inadvertent excavations. In addressing plaintiffs' NEPA claim, the court observed that the Settlement Act mandated restoration of grazing land and provided that no action furthering that law would be deemed a "major Federal action" for purposes of NEPA. *Id.* at 1412. BIA's construction activities were thus exempted from NEPA compliance.

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Case 70

Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979), *aff'd in part, rev'd in part*, 643 F.2d 835 (1st Cir. 1981), *rev'd sub nom. Weinberger v. Barcelo*, 456 U.S. 305 (1982).

This action was brought to enjoin the Navy from using for training operations its lands on and the waters around the island of Vieques in Puerto Rico. Plaintiffs alleged, among other things, that the Navy had failed to identify and protect all of the archeological and historic sites on the island as required by the National Historic Preservation Act (NHPA), Executive Order No. 11593, and the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA. After the complaint had been filed, the Navy conducted an archeological survey on the island that disclosed the existence of a number of previously unknown archeological sites, some of which appeared to meet the criteria for eligibility for the National Register of Historic Places. The survey covered 55 percent of one area on the island and 35 percent of another. The Navy did not, however, nominate to the Register or seek from the Secretary of the Interior a determination of the eligibility of any of the archeological sites identified in the survey.

The district court denied plaintiffs' motion for a temporary restraining order. On the merits, the district court concluded that the sampling method used in the survey provided an unbiased sample of the archeological sites on the entire island, 478 F. Supp. at 693 n.105, but that the Navy's failure to nominate or seek eligibility determinations for the newly discovered sites was a violation of Executive Order No. 11593. The court found that Executive Order No. 11593 has the force of law and its violation may be privately enforced. *Id.* at 694.

On appeal, neither party challenged the district court's ruling with respect to the nomination or determination of eligibility of the known sites, but one party questioned the court's decision on the adequacy of the survey, alleging that the survey did not locate all of the sites on the island. The First Circuit reversed the district court on this question, holding that Executive Order No. 11593 and Section 800.4 of the Council's regulations require an agency to locate, in consultation with the State Historic Preservation Officer, "all" and "any" sites that may be eligible for inclusion in the Register. 643 F.2d at 859. Because the archeologist who conducted the survey acknowledged that a substantial number of sites remained to be located on the island, the archeological survey that the Navy had done was inadequate. The appellate court held that the Navy did not have to do a 100 percent survey, but rather was required to follow up on the leads produced by the survey that had been done. *Id.* at 860. The court also confirmed that the National Historic Preservation Act applies to ongoing Federal undertakings. *Id.* at 859 n. 50.

The Supreme Court reversed the First Circuit on other grounds and did not consider the NHPA issues. 456 U.S. at 320.

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Case 71

Bayou St. John Improvement Association v. Sands, No. 81-1358 (E.D. La. May 28, 1981), *injunction modified*, [1983] 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,011 (E.D. La. June 17, 1982).

Plaintiff sought to enjoin a local levee district from building a levee and a roadway crossing at the mouth of Bayou St. John near a historic Spanish fort. The building project required a dredge and fill permit from the Army Corps of Engineers. Although the Corps had consulted with the State Historic Preservation Officer (SHPO) prior to taking action on the permit, it failed to conduct an archeological survey of the area despite the recommendation of the SHPO that one be done. The Corps also decided not to prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). The Corps then issued the permit. Plaintiffs obtained a temporary restraining order.

In considering plaintiffs' motion for injunctive relief, the court first rejected the Corps' defense of laches, finding the delay of approximately one year from the issuance of the permit to the filing of the lawsuit excusable because plaintiff had made efforts to resolve the conflict out of court. Moreover, although a considerable amount of money had been spent on the project, it was a small percentage of the total to be spent and would not be lost by further delay caused by the lawsuit. Slip op. at 6-7.

Second, the court examined Section 800.4(a)(2) of the regulations of the Advisory Council on Historic Preservation implementing Section 106 of the National Historic Preservation Act (NHPA), which states that the recommendation of a SHPO that a survey be done "should be followed." The court interpreted this provision as requiring the agency to follow the recommendation of the SHPO unless it can show good cause for not doing so. *Id.* at 11, 13. Concluding that the Corps had not shown good cause for its decision not to follow the SHPO's recommendation, the court enjoined the project until the agency could adequately consult with the SHPO.

Third, the court faulted the Corps for failing to prepare an EIS. It found that although NEPA requires consideration of historic and cultural resources, NEPA obligations placed on an agency are separate from those required by NHPA. *Id.* at 17. In the court's view, the Corps had not sufficiently examined the impact of the project on historic and archeological elements of the environment, *id.* at 23, and the Corps' conclusions regarding lack of impact were therefore unreasonable. *Id.* at 24.

After this opinion had been handed down, the Corps consulted with the SHPO and developed an environmental assessment. In so doing, the Corps considered the entire project area as though it were eligible for the National Register of Historic Places, and the SHPO withdrew all his objections after negotiation with the Corps. The SHPO nevertheless informed the Corps that he considered the entire area to be eligible for the Register. The Corps then sought to modify the injunction to permit implementation of most of the project.

The court closely examined the regulations of the Council and found that under Section 800.4(a)(3), the Corps was required to seek a determination of the eligibility of the area for the Register from the Secretary of the Interior because the SHPO had found the area to be eligible. If the area were to be found eligible, the Corps must provide the Council with an opportunity to comment. The court deferred consideration of the reasonableness of the Corps' decision not to prepare an EIS until the NHPA review had been completed. 13 Envtl. L. Rep. at 20,014.

Finally, the court granted the local levee board's motion to lift the injunction against certain non-Federal aspects of the project because no Federal funds were involved, the activities to be carried out would not cause any environmental impact on the area, and further delay would subject the public to expense. The levee board was required to proceed in a manner that would ensure the integrity and possible eligibility of the area for the Register.

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Case 62

Bennett v. Taylor, 505 F. Supp. 800 (M.D. La. 1980), _aff'd per curiam_, 663 F.2d 104 (5th Cir. 1981).

The owner of the Brame-Bennett House, a property listed in the National Register of Historic Places in 1973, sought to enjoin construction of a State highway segment that was to run in front of the house. Over the years, virtually all of the highway except the 4.5-mile stretch at issue in this case had been improved using Federal funds. Although Federal funds had been committed previously for the segment at issue, the Federal officials had withdrawn the commitment in 1967. The project now was to be funded solely with State money. There had been no compliance with the National Historic Preservation Act or the National Environmental Policy Act.

The court found that during the time that the highway segment was designated to receive Federal funds, the house was not listed in the Register. By the time the house had been listed, the Federal commitment had been withdrawn. The court concluded that there was no Federal undertaking that would trigger Section 106 of NHPA because there was no further commitment of Federal funds, no Federal review or approval was required, and no Federal agency was involved in the design or construction of the road. 505 F. Supp. at 812.

The court dismissed the action.

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Case 79

Benton Franklin Riverfront Trailway &;Bridge Committee v. Lewis, 701 F.2d 784 (9th Cir. 1983).

The cities of Pasco and Kennewick, Washington, determined that the Old Truss Bridge across the Columbia River was inadequate and decided to build a new bridge. They obtained financial assistance from the Federal Highway Administration (FHWA) of the Department of Transportation. Since the new bridge would span a navigable river, construction required a permit from the Coast Guard. The Coast Guard approved the construction permit on the condition that the old bridge would be removed. FHWA prepared an environmental impact statement under the National Environmental Policy Act approving demolition of the old bridge. The new bridge was completed in 1978.

In 1979, before the old bridge was demolished, it was determined to be eligible for the National Register of Historic Places. FHWA then initiated the consultation process established by the regulations of the Advisory Council on Historic Preservation implementing Section 106 of the National Historic Preservation Act. The parties to the consultation executed a Memorandum of Agreement (MOA) in 1980. The MOA provided that if FHWA determined in its statement required under Section 4(f) of the Department of Transportation Act that there were no feasible and prudent alternatives to the destruction of the old bridge, then demolition could proceed after recordation of the bridge. However, FHWA agreed to put the question of demolition to the voters of the two cities and not to authorize funds for removal if the voters wished to maintain the old bridge. The citizens voted for demolition of the old bridge and, on this basis, FHWA concluded in its Section 4(f) statement that there were no feasible and prudent alternatives to demolition.

The Ninth Circuit affirmed the district court's holding that the plaintiff had standing to maintain the suit. Plaintiff's allegations that demolition would adversely affect its interests and those of its members in the historic and aesthetic appreciation of the bridge were sufficient to meet the injury-in-fact prong of the standing test. The plaintiff was also within the zone of interests protected by the Department of Transportation Act. 701 F.2d at 787.

On the merits, the district court ruled that FHWA's Section 4(f) determination was not arbitrary or capricious and dismissed the complaint. The Court of Appeals for the Ninth Circuit reversed, finding that Section 4(f) applied because removal of the bridge was a "use from an historic site." The court rejected FHWA's argument that demolition of a structure was not a "use" of land as set out in Section 4(f). The court held that "there would be no sense in allowing the destruction and removal of structures on land and then determining whether the 'land' will be used by the proposed federal action." *Id.* at 788.

The Ninth Circuit found that FHWA acted arbitrarily in making its Section 4(f) determination because it did not act in accordance with regulations when it failed to inventory the old bridge as a "potentially historically protected site" at a time when there were many alternatives. FHWA was required by Section 800.4(a) of the Council's regulations to identify property listed in or eligible for the National Register. The court also found that FHWA should have considered in its 4(f) determination the possibility of Federal funding for preservation or rehabilitation of the old bridge. The agency could not rely on the results of the ballot as the basis for its selection of alternatives to consider. *Id.* at 788-91.

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Case 129

Berkshire Scenic Railway Museum v. Interstate Commerce Commission, 52 F.3d 378 (1st Cir. 1995).

The Berkshire Scenic Railway Museum sought review of an Interstate Commerce Commission (ICC) decision allowing a non-carrier to acquire and operate a rail line under a class exemption from ICC's more involved application process. The museum used a portion of the rail line as a scenic railway. The profits it generated helped fund the renovation of the Lenox Railroad Station, listed in the National Register of Historic Places. The museum alleged that the applicant provided false and misleading information in its application to ICC and failed to perform adequate historic preservation and environmental reviews.

During the administrative process, the applicant notified the Massachusetts State Historic Preservation Officer (SHPO) of its intention to use the rail line for freight service. The notification explained that the line was currently used for that purpose and, further, that no buildings were located on the property to be acquired. At the time of the notification, however, the applicant did not know that a small portion of the Lenox station encroached on the rail line. The SHPO responded that although there were historic properties listed in or eligible for the National Register adjacent to the rail line, the acquisition and operation of the line would not affect them.

In reviewing ICC's decision, the court gave broad deference to the agency, particularly its interpretation of its regulations regarding false and misleading information. 52 F.3d at 381. The court adopted ICC's view that an exemption is void under the regulation only if the false and misleading information pertained to a material part of the transaction. *Id.* The museum argued that the applicant's statements regarding historic properties located on the rail line and the use of the line were false and misleading.

The court rejected this argument, finding those comments "immaterial misstatements." *Id.* at 382. The transaction would have qualified for an exemption, the court reasoned, even if the facts had been properly represented because "historic preservation is simply not a material element of an 'acquisition and operation' transaction." *Id.*

Moreover, the court noted that the applicant proposed to use the line for freight service, the service for which the line had been previously used and, therefore, the acquisition could not adversely affect the Lenox station. The court also found as immaterial the fact that the applicant did not disclose to ICC that it would refuse to allow Berkshire to operate the scenic railway.

The museum also alleged that ICC did not properly conduct historic preservation review as required by the National Historic Preservation Act (NHPA). Specifically, the museum argued that the applicant's actions fell within the adverse effect criteria listed in the implementing regulations of NHPA because the transaction would result in isolation of the property from its setting and deterioration of the property. *Id.* (citing 36 C.F.R. § 800.9(b)(2), (b)(4)).

The court found no basis for the museum's arguments regarding isolation or deterioration because the scenic railway had already ceased operation for a year prior to the acquisition of the rail line and, therefore, the acquisition was not the cause of the isolation.

The court also was persuaded by the SHPO's no effect determination in which neither the Lenox station nor the scenic railway were mentioned. Additionally, the court observed that the station was not "isolated" from the railway because it actually encroached upon the right-of-way.

The court also determined that ICC had a rational basis for not conducting an environmental assessment (EA) because its regulations did not require an EA where there was only a change in ownership and no change in operations.

Finally, although the court did not decide the issue, it did note that "a substantial question exists" as to whether ICC

could condition the exemption issued to the applicant by requiring it to allow the railway museum to continue to use the rail line.

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Case 50

Birmingham Realty Company v. General Services Administration, 497 F. Supp. 1377 (N.D. Ala. 1980).

In 1979, two Federal agencies in Birmingham, Alabama, requested the General Services Administration (GSA) to procure office space for them. GSA conducted a market survey of the area and issued a solicitation for offers for the space required. GSA received six offers in response to its solicitation, one from plaintiff for the Stallings Building. The Advisory Council on Historic Preservation had found the Stallings Building to have historic significance under the terms of the Public Buildings Cooperative Use Act (PBCUA), but the building had not been determined to be eligible for or listed in the National Register of Historic Places as specified by the National Historic Preservation Act (NHPA).

GSA rejected plaintiff's bid because it was higher than other bids and had not met all of the requirements in GSA's solicitation for offers. Although GSA had a policy to accord precedence to historic buildings eligible for or listed in the Register, it did not consider the historic significance of the building in rejecting plaintiff's bid because the Stallings Building was neither listed in nor determined eligible for the Register. The court denied plaintiff's motion for a temporary restraining order.

One of the issues in the case was whether the Public Buildings Cooperative Use Act applied. Section 601a of the act requires GSA to use space in "suitable buildings of historic, architectural, or cultural significance, unless use of such space would not prove feasible and prudent compared with available alternatives." The court found that Section 601a was not limited to buildings actually listed or eligible to be listed in the National Register. 497 F. Supp. at 1384. Rather, the section requires that whenever GSA undertakes a survey of Government building needs, it must identify all historically, architecturally, or culturally significant buildings that would be suitable. *Id.* at 1385. Nevertheless, the court concluded that the act was not applicable in this case because it does not affect the Government's authority to lease buildings. Rather, PBCUA is aimed at acquiring, constructing, altering, repairing, remodeling, or extending buildings that would be under Federal control. *Id.* at 385.

Next, the court held that GSA had violated Executive Order No. 12072, which required GSA to consider use of historic buildings as an alternative in meeting Federal space needs. *Id.* at 1386, 1391. Unlike PBCUA, the Executive Order applies to leases. *Id.* at 1386. Nevertheless, the court declined to enjoin the lease on this ground because consideration of the peculiar unsuitability of the Stallings Building for the needs of the agencies outweighed consideration of historic significance. *Id.* at 1387.

Third, the court held that NHPA did not apply because the building had been neither listed in the Register nor determined eligible for the Register by any Federal or State agency. That the Council had declared the building to be historically significant under PBCUA was not sufficient. *Id.* at 1388. The court did not read Section 800.2 of the Council's regulations to expand NHPA's coverage to include properties that meet the criteria of eligibility but have not been formally determined to be eligible for the Register by the Secretary of the Interior. *Id.* at 1387.

Finally, the court found laches to be applicable. Plaintiff unreasonably delayed bringing his action for two months while the successful bidder proceeded to prepare his building for Government occupancy. *Id.* at 1390.

The Court declined to issue an injunction setting aside the award of the lease. *Id.* at 1391.

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Case 43

***Blue Grass Land &;Nature Trust, Inc. v. Adams*, No. 77-65 (E.D. Ky. Sept. 7, 1979).**

The Commonwealth of Kentucky and the United States Department of Transportation (DOT) proposed a joint highway construction project known as Paris Pike. DOT approved various aspects of the project in 1969, 1970, and 1973 and adopted in 1973 an environmental impact statement prepared under the National Environmental Policy Act. Plaintiffs, 35 individuals and 2 corporations, sought to enjoin the project on grounds that defendants had violated Section 4(f) of the Department of Transportation Act, Section 15(a) of the Federal-Aid Highway Act, the National Historic Preservation Act, and other laws.

The court first found that those plaintiffs who alleged use of the affected area or who owned property that would be subject to condemnation or impairment of use by the project had standing under the Administrative Procedure Act to maintain the lawsuit. Slip op. at 5.

Next, the court held that in considering defendants' defense of laches, the court must weigh the costs expended by defendants against the potential environmental benefits of compliance with the statutes at issue. *Id.* at 6. Because the project had not progressed so far that the costs outweighed the benefits, the court rejected the laches defense. *Id.* at 6-7.

Third, the court found that the action was not prohibited by the Eleventh Amendment of the United States Constitution because plaintiffs sought only prospective relief rather than payment from public funds from the State treasury. *Id.* at 7-8.

Finally, the court rejected defendants' argument that Section 4(f) did not apply because the land to be used was not formally determined to be historically significant until after the Federal approvals had been given. Section 4(f) requires that, prior to approving a project, the Secretary of Transportation must obtain a determination from the Federal, State, and local officials having jurisdiction over land to be used by a project as to whether any of the land is part of a historic site. *Id.* at 10. If any land from a historic site is to be used, then DOT must determine whether the site is of national, State, or local significance and, if so, must comply with Section 4(f). Lack of a formal determination of the eligibility of a property for the National Register of Historic Places by the Secretary of the Interior does not excuse DOT from its Section 4(f) duties. *Id.* at 10-11.

Although DOT had not complied with Section 4(f), the court examined the environmental impact statement to see if it revealed whether any land to be used was part a historic site, for if not, there would be no further Section 4(f) duties. When it could find no evidence that any inquiries had been made, the court enjoined defendants from proceeding with the project until DOT could comply with Section 4(f).

The court declined to decide the National Historic Preservation Act issues because they could become moot by DOT's compliance with Section 4(f). *Id.* at 13.

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Case 107

Boarhead Corporation v. Erickson, 726 F. Supp. 607 (E.D. Pa. 1989), *aff'd*, 923 F.2d 1011 (3d Cir. 1991).

A property owner brought suit against the Environmental Protection Agency (EPA) to enjoin EPA pre-cleanup activities on his property, a superfund site, on grounds that the EPA must first comply with Section 106 review. After exposing parts of his land to toxic waste, plaintiff alleged that Indian remains and artifacts should be protected before EPA initiated investigative and clean-up activities. The district court dismissed plaintiff's complaint for lack of subject matter jurisdiction, and the court of appeals affirmed.

The appellate court explained that, generally, Federal question jurisdiction and a private right of action exist in a complaint arising under the National Historic Preservation Act (NHPA). 923 F.2d at 1017. However, the district court does not have such jurisdiction when the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is involved. *Id.* at 1013. In fact, Section 113 of CERCLA denies the district courts jurisdiction to hear complaints challenging EPA's superfund cleanup or pre-cleanup activities until after those activities have been completed, even if a statute ordinarily would create a Federal claim. *Id.* at 1013-14. Furthermore, the court denied plaintiff's claim for equitable relief, finding that the complaint did not fall within the exceptions in Section 113(h) of CERCLA. The court also found that Section 113 of CERCLA precludes the presumptive right of judicial review established under the Administrative Procedure Act. *Id.* at 1014.

According to the court, CERCLA's language and legislative history reflect Congress' intent to limit district court jurisdiction in order that EPA might respond expeditiously to serious hazards. As support for its finding, although not critical to its decision, the court cited *Bywater Neighborhood Association v. Tricarico,* 879 F.2d 165, 167 (5th Cir. 1989), where the Fifth Circuit held that NHPA could not circumvent the exclusive procedures for direct review in the courts of appeal set forth in the Federal Communications Act. The court did, however, distinguish *Tricarico* because plaintiff in *Tricarico* made no showing of irreparable harm and, further, his complaint would have received adequate consideration at some point in the appropriate court. Unlike *Tricarico,* delayed review under CERCLA meant no effective review at all given that review would take place only after irreparable damage or destruction to the archeological site had already occurred. 923 F.2d at 1021.

Although the court found that CERCLA precluded jurisdiction over the case, it opined that "EPA would be well advised to follow its own regulations" and consider the impact of its activities on the site's historic values. *Id.* at 1022 n.17. Indeed, the court noted that EPA did not deny that it was bound by the terms of NHPA when it conducted cleanup activities under CERCLA. *Id.* Moreover, the court observed that EPA's own regulations provided that it must consider the factors that go into Section 106 review. *Id.* Because plaintiff did not demonstrate that EPA would not abide by its regulations, however, the court did not reach the question of whether judicial review would be available if plaintiff could show that EPA failed to comply with its regulations.

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Case 5

***Boston Waterfront Residents Association v. Romney*, 343 F. Supp. 89 (D. Mass. 1972).**

Plaintiffs sought a preliminary injunction to prevent the Department of Housing and Urban Development (HUD) from funding, under the Housing Act of 1949, the demolition of buildings of possible historic value as part of the city of Boston's Faneuil Hall Urban Renewal Plan to redevelop its waterfront. The buildings were not listed in the National Register of Historic Places, and there was a controversy over their historic value. HUD had not prepared an environmental impact statement (EIS), and plaintiffs argued that the National Environmental Policy Act (NEPA) so required.

The court declined to make a determination as to the historic value of the buildings. It found, however, that the continuing Federal involvement in the project, NEPA's policy in favor of historic preservation, and NEPA's requirement to consider alternatives required the agency to prepare an EIS, especially because particular portions of the project were planned for the future and there was still time and opportunity for the consideration of alternatives. Preservation and rehabilitation of the buildings were possible alternatives that had to be considered before the buildings could be razed. Because demolition would permanently foreclose such alternatives, the court granted plaintiffs' request for preliminary injunctive relief. 343 F. Supp. at 91.

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Case 89

Boyd v. Roland, 789 F.2d 347 (5th Cir. 1986).

Property owners claimed their neighborhood was eligible for listing in the National Register of Historic Places and would be adversely affected by the construction of a new building to replace a 1919 structure. The new building would be financed with a loan from the Department of Housing and Urban Development (HUD). Prior to the approval of the loan, loan applicants notified the Mississippi State Historic Preservation Officer (SHPO) of their intent to renovate the historic building and invited the SHPO to comment. One week after receiving the notification, the SHPO notified the applicants that the building appeared architecturally significant and requested more information. The SHPO received no response to this request.

Once HUD funds were released, however, the loan applicants decided to demolish the historic building and erect a new one on the same site. After the demolition and the onset of new construction, neighborhood residents filed suit in district court alleging a violation of Section 106 of the National Historic Preservation Act (NHPA). The district court denied the property owners' request for a temporary restraining order and preliminary injunction and dismissed the case. In denying the request, the court found that the neighborhood was not protected by NHPA because it had not been "officially" determined eligible for the National Register. According to the district court, only properties listed in or officially determined eligible for listing in the National Register fall within NHPA's purview.

The court of appeals disagreed with the district court's interpretation of NHPA, concluding that "eligible" property is not restricted to a property that has been officially determined eligible for inclusion in the National Register. *Id.* at 349. Analyzing amendments to NHPA and corresponding regulatory changes, the appellate court noted that before 1976, NHPA required agencies to consider the impact of their undertakings only on properties included in the National Register. *Id.* at 348-49. In 1976, however, Congress amended NHPA to require consideration of properties included in or eligible for inclusion in the National Register. *Id.* at 349 (citing 16 U.S.C. § 470(f)). Moreover, upon reviewing the regulations that implement Section 106, the court found that "eligible property" includes any property that meets National Register criteria, even if it has not been formally determined as meeting the criteria. *Id.*

Because the court of appeals found that the neighborhood was eligible for listing and thus subject to NHPA, it remanded the case to the district court so that plaintiffs could seek relief in light of the appellate court's finding. The court, however, affirmed the district court's denial of a preliminary injunction since the project was well underway at the time of the district court hearing. Subsequently, on petition for rehearing, the appellate court vacated the district court order denying the preliminary injunction because it was based on an erroneous interpretation of NHPA. The court did note that a preliminary injunction might nonetheless be inappropriate given that construction had progressed substantially at the site.

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Case 142

Brewery Dist. Soc. v. Federal Highway Admin., 996 F.Supp. 750 (S.D. Ohio 1998).

In a second opinion regarding the historic Ohio State penitentiary, the same district court that ruled against a temporary restraining order in *American Institute of Architects v. City of Columbus*, 1998 WL 340445 (S.D. Ohio 1998), ruled that a lawsuit could proceed against the Federal Highway Administration (FHWA), under the "anticipatory demolition" provision of Section 110(k) of the National Historic Preservation Act (NHPA).

The court ruled to deny FHWA's motion to dismiss, thus allowing the suit to proceed by determining that plaintiff, Brewery District Society, had standing to sue, that NHPA conferred a private right of action, and that plaintiff had not violated Fed. R. Civ. P. 19(a) by failing to join the City of Columbus as a necessary party.

The lawsuit sought to prohibit both FHWA and the Environmental Protection Agency (EPA) from providing any type of funding or assistance to the City of Columbus in connection with the downtown arena project, including the demolition of the penitentiary until such agencies consulted with the Advisory Council on Historic Preservation (Council).

Specifically, plaintiff argued that the demolition of the historic penitentiary constituted "anticipatory demolition" under Section 110(k) of NHPA. Section 110(k) was adopted in 1992 to discourage "anticipatory demolition" by prohibiting Federal agencies from providing grants, loans, permits, or other assistance to any applicant who intentionally destroys a historic property in order to avoid compliance with Section 106 of NHPA, unless the agency consulted with the Council to determine whether such assistance was nevertheless justified.

The court allowed the case to proceed against defendant, FHWA. It dismissed the suit against EPA, on the grounds that the complaint's allegations against EPA were "too hypothetical and conjectural to meet the Article III standing requirements." Plaintiff had only alleged that EPA "may be asked to provide assistance" to the city. The court believed that plaintiff needed to show a more immediate threat of harm than merely alleging that some Federal agency may be asked at some point in the future to provide assistance.

The claims against FHWA were allowed to remain based on the allegations of FHWA's current or imminent involvement in joint planning with the city, which would result in "assistance" relating to the penitentiary site.

The court also ruled that NHPA provides a private right of action outside of the Administrative Procedure Act, under Section 305 of NHPA. The court referenced that two cases did exist that stated otherwise. (See Cases 52 and 134). However, the court believed that the greater weight of authority held for the existence of such a right of action under Section 305. (See Cases 102, 107, 114, 133, and 141).

The last argument addressed by the court was whether the case should be dismissed for failure to join the City of Columbus as a necessary party under Fed. R. Civ. P. 19(a). While the court acknowledged that "the Federal agency defendants do not have the power to prevent the City from destroying the remaining buildings on the pen site," the court stated, "that fact alone does not render the city a necessary party under Rule 19."

The court explained that it can "provide plaintiffs the relief they request: to enjoin FHWA from providing assistance which is prohibited under Section 470h-2(k), and can declare the rights, duties and responsibilities of the remaining parties in the litigation."

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Case 102

Bywater Neighborhood Association v. Tricarico, 879 F.2d 165 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

Bywater Neighborhood Association brought suit against the Federal Communications Commission (FCC) and owners of a television microwave tower and satellite earth station, seeking removal of the tower and station which they deemed inconsistent with the character of the Bywater National Historic District. Plaintiffs alleged that FCC failed to comply with the National Historic Preservation Act (NHPA) when it did not consult with the Advisory Council on Historic Preservation prior to licensing the structure.

At the outset, the Fifth Circuit noted that NHPA creates a private right of action outside the Administrative Procedure Act which grants private parties the right to sue Federal agencies, but not private defendants. 879 F.2d at 167. The court's opinion, however, focused on the jurisdictional question of whether the exclusive procedures for judicial review of FCC licensing decisions in the courts of appeals could be circumvented under NHPA, the Mandamus and Venue Act, or the Declaratory Judgment Act.

The court explained that "some tension exists" between NHPA, which grants interested persons the right to bring suit in any United States district court and provisions of the Judicial Code at 28 U.S.C. § 2342, and the Communications Amendments Act of 1982 which grant exclusive jurisdiction over appeals of FCC final orders to United States courts of appeal. The Fifth Circuit resolved the conflict between the statutes by finding that only the courts of appeals, not the district court in which plaintiffs filed suit, had jurisdiction to hear appeals from FCC rulings. 879 F.2d at 168.

The court reasoned that Congress had specifically expressed its intent to grant exclusive jurisdiction over FCC rulings to the courts of appeal and found that the legislative history of NHPA showed no intent to override the special provisions concerning FCC.

The court also rejected plaintiffs' argument that the Mandamus and Venue Act and the Declaratory Judgment Act were independent bases for district court jurisdiction. Such acts, it explained, were extraordinary remedies, unavailable until plaintiffs had pursued the specific mode of judicial review as set forth by Congress. Finally, the court observed that the D.C. Circuit, not the Fifth Circuit, was the appropriate forum to hear the neighborhood association's complaint, once it exhausted its administrative remedies, because the complaint falls within 47 U.S.C. § 402(b)(6), which grants the D.C. Circuit the exclusive right to hear appeals regarding licensing decisions. *Id.* at 169.

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Case 51

Capitol Hill Restoration Society v. Heimann, No. 80-0237 (D.D.C. July 31, 1980).

Plaintiff sought a declaratory judgment that the Comptroller of the Currency had failed to comply with Section 106 of the National Historic Preservation Act (NHPA) and the regulations of the Advisory Council on Historic Preservation implementing Section 106 in approving the application of a national bank to establish and operate a branch bank. The bank had applied to the Comptroller for permission to establish the branch in June 1978. Although the plaintiff actually learned of the site design in November 1978, it waited until December 1979 to take any action. At that time, it contacted the Council, which then wrote to the Comptroller requesting a determination of the effect of the application approval on historic properties. The plaintiff did not contact the Comptroller directly until January 1980, just before it filed its complaint.

Defendants argued that the suit should be barred by laches. The court agreed, finding that plaintiff had unreasonably delayed in bringing its claim and that the delay caused prejudice to the Comptroller and the bank. Slip op. at 4.

The court went on, however, to discuss the merits of the case, assuming *arguendo* that the claim was not barred by laches. Although there was no dispute that the Comptroller is the head of a Federal agency subject to NHPA, the court found Section 106 to be inapplicable. The action to which plaintiff objected was not the establishment of the branch, which was within the Comptroller's jurisdiction, but its design and construction. Because these activities were not federally undertaken, assisted, or licensed, but were to be carried out by private firms, the Comptroller was not required to conduct a historic preservation review. *Id.* at 7-8.

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Case 52

Carson v. Alvord, 487 F. Supp. 1049 (N.D. Ga. 1980).

Suit was brought to enjoin the Department of Housing and Urban Development (HUD) from guaranteeing financing for a public housing project known as Paces Ferry Woods. HUD had contacted the State clearinghouse seeking their comments on the project. In response, the State submitted to HUD a memorandum containing language, which the court characterized as "boilerplate," stating that there existed a "probability that archeological resources might be present on the property." The State's memorandum nevertheless concluded that the project would have no effect on "historic, structural" properties eligible for the National Register of Historic Places. HUD's own study of the area found that there were no significant historic features. Plaintiffs, however, claimed that various Civil War relics had been found on the project site and that HUD was therefore required to comply with the National Historic Preservation Act (NHPA).

The court granted a temporary restraining order, dissolved it, and then granted a second restraining order against the issuance of the building permit. On the merits, the court first held that neither NHPA, the National Environmental Policy Act, the Historic and Archeological Data Preservation Act, nor the regulations underlying these statutes create a private cause of action. 487 F. Supp. at 1052. Plaintiffs' right of action was limited to their ability to seek review under the Administrative Procedure Act. *Id.* at 1053.

The court held that without evidence submitted by the State clearinghouses that historic resources were present on the site, HUD had no obligation to perform any in-depth archeological studies based on the mere potential for resources noted in the boilerplate language. The fact that plaintiffs' survey differed from the one used by HUD to form its conclusions did not show that HUD acted arbitrarily or capriciously. *Id.* at 1054. The court dismissed the case.

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Case 64

***Catholic Action of Hawaii/Peace Education Project v. Brown*, 468 F. Supp. 190 (D. Haw. 1979), *rev'd*, 643 F.2d 569 (9th Cir. 1980), *rev'd sub nom. Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981).**

Plaintiffs sought to enjoin the Navy from using newly constructed munitions facilities on the Pearl Harbor Naval Base in Honolulu, Hawaii, that were capable of storing and maintaining nuclear weapons. Whether nuclear weapons were to be stored in the facility was classified information that could not be made public for reasons of national security. The Navy had prepared a classified environmental impact assessment which concluded that the project would have no significant impact on the environment, as defined by the National Environmental Policy Act (NEPA), and no effect, under the terms of the National Historic Preservation Act (NHPA), on the Okiokiolepe Fishpond, a site listed in the National Register of Historic Places. The Navy did not prepare an environmental impact statement (EIS).

After rejecting the defendant's claim of laches, the district court concluded that, "as a result of the conclusion reached in the environmental impact assessment," the Navy had not violated NHPA. 468 F. Supp. at 193.

The district court denied plaintiffs' motion for an injunction, finding that the Navy's decision that the submission of an environmental impact statement would conflict with the national security provisions of the Atomic Energy Act was reasonable. *Id.* at 193. The Ninth Circuit reversed this conclusion, holding that the Navy should prepare a hypothetical EIS for public information. 643 F.2d at 571-72. Once this was done, the Ninth Circuit envisioned that the district court would then determine the effect on the historic fishpond. *Id.* at 272.

The Supreme Court reversed the Ninth Circuit's requirement that a hypothetical EIS be prepared, holding that because information on the facility could be withheld from public disclosure under the Freedom of Information Act, NEPA's disclosure requirements did not apply. 454 U.S. at 145. Nevertheless, NEPA's requirement that the Navy consider environmental consequences in its decisionmaking would still apply, and if the Navy determined that an EIS was necessary, it could prepare the EIS solely for internal use. *Id.* at 146. The Supreme Court did not address the NHPA issues.

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Case 44

Central Oklahoma Preservation Alliance, Inc. v. Oklahoma City Urban Renewal Authority, 471 F. Supp. 68 (W.D. Okla. 1979).

Plaintiff, a nonprofit corporation, sought to enjoin demolition of the Hales Building in Oklahoma City, Oklahoma, proposed as part of an urban renewal project partially financed through the Department of Housing and Urban Development's (HUD) loan and capital grant program. The grant contract was executed in 1968 and amended several times before 1977. Two of the amendments, approved in 1974 and 1977, dealt with historic preservation questions. After each of these amendments, HUD prepared a special environmental clearance.

The Hales Building had never been listed in the National Register of Historic Places or nominated for inclusion in the Register. From 1973 through 1977, neither HUD, the State Historic Preservation Officer (SHPO), nor the city found any evidence of special historic merit in the Hales Building.

In 1978, however, plaintiffs raised the question of the historic qualities of the building. In response, the SHPO held a hearing to consider the eligibility of the building and concluded that the building did not qualify for nomination to the Register. Soon after, nevertheless, the Keeper of the National Register unilaterally determined that the building was eligible for inclusion in the Register.

First, plaintiff challenged HUD's special environmental clearances accompanying the two amendments as insufficient compliance with the National Environmental Policy Act. The court rejected plaintiff's arguments, finding that the record supported HUD's determination that the amendments did not require an environmental impact statement. 471 F. Supp. at 78-79.

Second, plaintiff alleged that HUD violated the National Historic Preservation Act (NHPA) by failing to give the Advisory Council on Historic Preservation an opportunity to comment on the project as required by Section 106 of NHPA. The court determined that the Council's regulations implementing Section 106 applied only if the building in question had been listed in or nominated to the National Register at the time of the last amendment to the contract. Because it had not, Section 106 did not apply.

Moreover, the court found that HUD did not have to do a survey under Section 2(a) of Executive Order No. 11593 because Section 2(a) applied only to federally owned or controlled properties and not to privately owned properties such as those involved in this case. *Id.* at 79. The administrative record established that HUD had examined the National Register, consulted with the SHPO, considered input from the local agency, funded and reviewed detailed professional studies, conducted its own inquiries and review, and arrived at its determination in compliance with the law. *Id.* at 79-80.

Finally, the court held that the Keeper's unilateral determination that the building was eligible for the Register did not trigger the Council's regulations because the determination was made after the planning and approval for the project had been concluded and no significant HUD decision remained to be made. The court stated that the Council's regulations did not require additional review when HUD's Section 106 responsibilities had been previously discharged in a proper manner. *Id.* at 80-83.

The court denied plaintiff's application for injunctive relief. *Id.* at 84.

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Case 72

***Citizens & Landowners Against the Miles City/New Underwood Powerline v. Secretary, United States Department of Energy*, 513 F. Supp. 257 (D.S.D. 1981), *aff'd*, 683 F.2d 1171 (8th Cir. 1982).**

Landowners brought this action to enjoin construction of an electrical transmission line being constructed in part by the Western Area Power Administration (WAPA), an agency of the Department of Energy. Plaintiffs challenged WAPA's environmental impact statement (EIS) under the National Environmental Policy Act and alleged violations of the National Historic Preservation Act (NHPA) and the Archeological Resources Protection Act (ARPA), claiming that the cultural resources investigation done in conjunction with the preparation of the EIS was inadequate.

Without elaborating, the court found that the investigation was adequate and held that plaintiffs had failed to establish any violation of NHPA or ARPA. 513 F. Supp. at 261 n. 5. The court also found the EIS to be adequate. *Id*.

Finally, the court found that laches would bar plaintiffs' claims. Plaintiffs were aware of the proposed project in 1978 and had attended meetings, had an opportunity to comment on the EIS, and had otherwise been involved in WAPA's administrative process. In 1980, WAPA notified one of the plaintiffs of its construction plans and began unloading construction materials at various sites along the transmission line route. Although plaintiffs filed the lawsuit in early 1981, they sought no injunctive relief until April, when they obtained a temporary restraining order. The court found that thispresented a "clear case of parties sitting on their rights" and that plaintiffs should have attempted to assert their rights long before they did. Moreover, an injunction would cause hardship on defendants. *Id.* at 264. [Ed. note: The court referred to its earlier findings of fact filed after denial of a preliminary injunction for discussion of the harm to defendants.]

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Case 32

***Citizens' Committee for Environmental Protection v. United States Coast Guard*, 456 F. Supp. 101 (D.N.J. 1978).**

Plaintiffs sought to enjoin the construction of a freeway extension for which the State defendant was required to seek permits from the Coast Guard and the Army Corps of Engineers. The proposed highway route would run through parkland and would adversely affect historic sites. The Coast Guard, as lead agency, had entered into a Memorandum of Agreement (MOA) under the regulations of the Advisory Council on Historic Preservation implementing Section 106 of the National Historic Preservation Act with the State Historic Preservation Officer and the Council and had prepared a combined environmental impact statement (EIS) and Section 4(f) statement under the National Environmental Policy Act (NEPA) and the Department of Transportation Act. The court denied plaintiffs' motion for a temporary restraining order. On the merits, plaintiffs alleged that the State defendant was violating the terms of the MOA and challenged Federal defendants' compliance with NEPA and Section 4(f).

The court first concluded that plaintiffs did not have the privity of contract necessary to maintain an action alleging breach of duties imposed by the MOA. 456 F. Supp. at 115. Even if plaintiffs were parties to the MOA, they had not shown that the State defendant intended to breach the MOA, a prerequisite to maintenance of a claim of anticipatory breach of contract. *Id.* at 116.

Second, the court found that plaintiffs had failed to satisfy the case or controversy requirements of the United States Constitution because they had not established that they had suffered any injury-in-fact arising out of the MOA. *Id*.

The court went on to reject plaintiffs' challenges to the permits and the EIS/Section 4(f) statement and entered judgment for defendants. *Id.* at 120-21.

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Case 33

***Citizens' Defense Fund v. Gallagher*, [1979] 9 Envtl. L. Rep. (Envtl. L. Inst.) 20,420 (D. Mont. Nov. 3, 1978).**

The city of Anaconda, Montana, proposed to demolish certain buildings in downtown Anaconda as part of an urban renewal project funded by the Department of Housing and Urban Development (HUD). None of the buildings were listed in the National Register of Historic Places, and the State Historic Preservation Officer (SHPO) had determined that none of the buildings were of historic significance. HUD had conducted no independent examination of the project area but had "rubber-stamped" the SHPO's determinations. Plaintiff sought injunctive relief, alleging that the National Historic Preservation Act (NHPA) and the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA had been violated.

The court held that HUD's rubber stamping of the SHPO's determination that there were no eligible properties in the area violated NHPA and the Council's regulations. Moreover, the court found that although Section 104(h) of the Housing and Community Development Act (HCDA) permitted HUD to delegate its National Environmental Policy Act responsibilities to the city, the section did not authorize HUD to delegate its NHPA responsibilities. Slip op. at 5. [Ed. note: Congress clarified its intent to allow delegation of NHPA duties in the 1980 amendments to HCDA.]

Finally, the court denied defendants' request to require plaintiff to post a more substantial security bond. To require an organization of limited financial resources to post more than a minimal bond would "stifle the intent of NHPA." *Id.* at 6.

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Case 110

Citizens for the Scenic Severn River Bridge, Inc. v. Skinner, 802 F. Supp. 1325 (D. Md. 1991), *aff'd*, 972 F.2d 338 (4th Cir. 1992).

A group of citizens and the city of Annapolis sought injunctive relief against the Maryland State Highway Administration (SHA) and the Department of Transportation (DOT) to prevent the replacement of a bridge across the Severn River. The bridge, adjacent to the United States Naval Academy‹a National Historic Landmark‹and a State park, is also close to the city's historic area. Plaintiffs based their allegations primarily on violations of the National Environmental Policy Act (NEPA), Section 4(f) of the Department of Transportation Act, and the National Historic Preservation Act (NHPA), as well as several other Federal regulations and State laws.

Plaintiffs' NEPA claim alleged that the Maryland SHA should have prepared an environmental impact statement (EIS) and that DOT should not have categorically excluded the project from the EIS requirement. DOT regulations include bridge replacements as categorical exclusions; however, plaintiffs argued that this particular project did not constitute a bridge replacement since the new bridge would differ from the original in its size, design, and site. 802 F. Supp. at 1333. The court found that even if these allegations were true, the project still fell within the bridge replacement categorical exclusion. Moreover, the court found that DOT had properly conditioned the exclusion, conducting a Section 4(f) study in accordance with the Transportation Act. *Id.* at 1330-31. The court stated that the study supported the initial finding of no impact and appropriately reconsidered the exclusion as the project was finalized. *Id.* at 1333.

With regard to the Section 4(f) claim, the court found that defendants had complied with Section 4(f), as they adequately considered how certain properties would be "used" by the project. The court examined the administrative record to determine whether there was "serious consideration of the appropriate factors" and declined to overturn the agency's decision because it had properly considered the necessary facts and came to reasonable conclusions. *Id.* at 1334. *See also id.* at 1333-37. The court also determined that the timing of the Section 4(f) statement was adequate‹even though it was prepared in the early stages of the project‹because the defendants had committed to a high level bridge by the time the statement was prepared. Additionally, the court noted that the proposed alternative would be continually reviewed. *Id.* at 1336.

In addressing plaintiffs' claim that defendants had violated NHPA, the court observed that the existing bridge had never been "recognized as protected under the NHPA." Thus, the court found that defendants were under no duty to consider the effects of the project. *Id.* at 1337. The court observed that the Maryland State Historic Preservation Officer (SHPO) had responded to defendants' inquiry, determining that the bridge was not eligible for the National Register. Even assuming the bridge was protected, the court stated, defendants had properly considered the bridge by documenting the decision, notifying the Advisory Council on Historic Preservation, and providing the Council with an opportunity to comment. In assessing the effect of the bridge replacement, the Maryland SHA had from the onset solicited the SHPO's view on various alternatives. Further, the SHPO had conducted an extensive review of the impact of the high bridge alternative, including on-site inspections and a traffic study. The SHPO made a conditional no adverse effect finding, provided that it would be consulted on design issues. The Council concurred in the finding. Based on these facts and the court's observation that NHPA "does not prohibit the replacement or even destruction of any protected property, only that their historical importance be considered," the court found defendants had adhered to NHPA's requirements. *Id.* at 1338.

Plaintiffs' arguments regarding violations of regulatory requirements were also unsuccessful. Plaintiffs alleged that the public hearing requirements in DOT regulations were not fulfilled by holding hearings early in the process. The court found that at the early public hearings DOT solicited the public's views and adopted a high bridge alternative in response. Because the debate at the public meeting focused on clearances between 60 and 80 feet, the court found that the 75-foot bridge was within the parameters the public contemplated. These early meetings had been highly publicized, and DOT had responded directly to the views of the public. *Id.* at 1340. Thus, the court found adequate

public involvement.

As a final matter, the court considered defendants' equitable defenses to the action based on the principles of estoppel and laches. Defendants argued that the project had enjoyed active city support over several years. The court agreed with defendants and held that plaintiffs should be estopped from bringing the action at this late stage. The court similarly agreed with the laches defense, finding that plaintiffs had notice about the planned construction and were not diligent in bringing their suit earlier; defendants were thus prejudiced. Even assuming the cause of action arose only after project funds were appropriated in December 1990, a full year before the district court decided the case, the delay still considerably prejudiced defendants, according to the court.

The court granted defendants' motion for summary judgment and denied plaintiffs' request for a preliminary injunction.

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Case 153

City of Alexandria v. Slater, 198 F.3d 862 (D.C. Cir. 1999).

Plaintiffs-appellees, City of Alexandria, et al., had challenged the Federal Highway Administration's (FHWA) compliance with the Clean Air Act, the National Environmental Policy Act (NEPA), Section 106 of the National Historic Preservation Act, and Section 4(f) of the Department of Transportation Act in its approval of plans to replace the Woodrow Wilson Memorial Bridge, which connects Virginia and Maryland over the Potomac River. The district court held in favor of plaintiffs. FHWA appealed the district court's decision, except the Clean Air Act issue. As explained below, the circuit court decided in favor of FHWA and reversed the district court's decision.

The district court had found that FHWA violated NEPA because the final Environmental Impact Statement (FEIS) had 1) not afforded detailed consideration to a 10-lane river crossing alternative as a "reasonable alternative"; and 2) insufficiently considered the temporary environmental impact of the construction phase of the project.

The circuit court disagreed. First, it noted that the 10-lane river crossing alternative was not a "reasonable alternative." The reasonableness of an alternative is judged in light of the objectives of the Federal action. A Federal agency can properly exclude those alternatives that do not bring about the ends of the Federal action. The district court had begun its reasoning by holding that FHWA's objectives were improper because they focused on transportation and safety needs. The circuit court, however, rejected that argument by finding that such objectives were reasonable in replacing a congested and structurally unsound bridge.

The district court had then held that the 10-lane alternative was reasonable since it fit the "broad" statement of need and purpose of the project. The circuit court, again, disagreed by pointing out that the purpose and need were quite particular and focused on traffic needs projected for the year 2020. The 10-lane alternative, in the circuit court's view, did not fit those needs in that it would only accommodate half the estimated capacity on peak hours and higher accident rates.

The district court had also held that the 10-lane alternative was a "reasonable alternative" in light of a previous case holding that an agency could not disregard an alternative merely because it did not offer a complete solution to the problem at hand. The circuit court agreed that such was the case within the context of a coordinated effort to solve a broad problem of national scope and where other agencies may be able to provide the remainder of the solution. The circuit court, however, did not find this to be the case with the Woodrow Wilson Bridge replacement, since it was a discrete project within the jurisdiction of just one Federal agency (FHWA).

The circuit court also reversed the district court's decision that NEPA had been violated due to insufficient consideration of the temporary impact of the construction phase of the project. FHWA's consideration seemed reasonable and justified to the circuit court under the circumstances. FHWA had addressed, however briefly, a range of expected construction impacts.

NEPA does not "demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." The circuit court argued that the brevity of FHWA's discussion on construction impact was justified in light of 1) the proper, and arguably required, need for delay in identifying staging sites; 2) the numerous regulatory constraints that will limit the extent of construction activities; and 3) the "relatively modest" disruption caused by the construction itself in terms of scope and duration.

The circuit court then considered the Section 106 and Section 4(f) issues. The district court had found that FHWA had violated Section 106 by postponing the identification of the sites that were to be used for construction-related ancillary activities. It also held that, since it believed FHWA had not completed the Section 106 identification process, FHWA

had also necessarily violated Section 4(f). The circuit court disagreed.

FHWA had conducted several surveys that resulted in the identification of 23 historic properties in the project area. A Memorandum of Agreement (MOA) was signed by, among others, FHWA, the State Historic Preservation Officers of Virginia, District of Columbia, and Maryland, and the Advisory Council on Historic Preservation. The MOA identified the sites to be affected by the project and set forth mitigation measures. The MOA also recognized that the identification of historic properties that could be affected by the actual construction activities would have to be postponed until the sites for construction staging, wetland mitigation and dredge disposal sites were selected. Nevertheless, FHWA bound itself through the MOA to fulfill its Section 106 responsibilities when selecting those sites.

Based on the Corridor H Alternatives case (see Case 152), the district court found that postponing those identification efforts meant that the Section 106 process had not been concluded before the approval of the project. This led the district court to find that Section 106 and Section 4(f) had been violated. The circuit court, however, distinguished the present situation from that in the Corridor H Alternatives case, where FHWA had postponed the entire Section 106 process for a major highway corridor until after it had issued its Record of Decision. By contrast, in the present case FHWA had identified historic properties along the entire project corridor and documented its findings prior to approval of the project. The only part that was deferred was the identification of historic properties "that might be impacted by a small number of 'ancillary activities.'"

Furthermore, FHWA had a good reason for this postponement. The specific identification of construction staging sites requires work that is not conducted until the design stage of the project. The design stage, in turn, may not be completed until after the Final EIS.

Finally, the circuit court noted that the Section 106 regulations in place at the time (i.e., those that went into effect in 1986) allowed the postponement at issue in the present case by encouraging flexibility and specifying they should not be interpreted to prohibit phased compliance at different stages in planning. [Ed. note: the Section 106 regulations that have been in place since 1999 explicitly provide for phased identification of historic properties in certain cases. See 36 C.F.R. § 800.4(b)(2).] The circuit court concluded its discussion of the Section 106 issue by stating that particularly where the sites whose identification is postponed are merely ancillary to the project, Section 106 and the identification prerequisites of Section 4(f) "do not forbid the rational planning process adhered to by" FHWA.

The circuit court ended its opinion by disposing of two Section 4(f) arguments that had been raised by the appellees. The first argument was that FHWA failed to consider all prudent and feasible alternatives to using historic properties. An alternative can only be "prudent" if it satisfies the transportation needs of the project. The circuit court had already held that a narrower bridge did not satisfy the needs of the project. Moreover, appellees did not present a "prudent" alternative that had a less significant impact on historic properties.

The second argument was that FHWA had failed to engage in all possible planning to minimize harm to the historic properties. The circuit court first noted that the appellees did not question the finding that the preferred and selected alternative (of all seven "prudent and feasible" alternatives) would result in the least overall impact to historic properties. Finally, FHWA had mitigation plans for those situations where it could not identify a feasible and prudent plan to avoid impact on a historic property.

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Case 45

City of Columbia v. Soloman, No. 78-2109 (D.S.C. June 12, 1979).

The city of Columbia, South Carolina, sought to enjoin the General Services Administration (GSA) from beginning construction of a multilevel parking facility at the corner of Laurel and Assembly Streets. The parking garage was part of a larger project that included a Federal building and United States courthouse, which were being built nearby.

The parking garage site was in a depression approximately 70 feet below the level of Laurel Street. As originally designed, only the elevator and stair towers of the completed parking garage would extend above Laurel Street. The site of the project was near Historical District No.1, which contained several buildings listed or eligible for listing in the National Register of Historic Places, including the Caldwell-Hampton Boyleston House, the Horry-Guinyard House, the South Carolina Governor's Mansion, and the Palmetto Iron Works and Armory (Arsenal Hill).

GSA had consulted with the State Historic Preservation Officer (SHPO) on several occasions regarding the archeological and historic resources that might be affected by the entire project. Initially, the SHPO found that the complex would have an adverse effect on the historic district. GSA then prepared an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) on the project, noting the close proximity of the historic district and outlining GSA's plans to consult further with the Advisory Council on Historic Preservation and the SHPO. Apparently, the multilevel parking facility had not yet been designed, for the EIS referred to the parking area as "surface."

GSA then sent the EIS to the Council. The Council responded, noting GSA's efforts to discover the historic impact caused by the entire project and thanking GSA for "the opportunity to comment on the project." Nevertheless, the Council advised GSA of the need to comply with Section 106 of the National Historic Preservation Act (NHPA) and Executive Order No. 11593 if any property listed or eligible for listing in the National Register of Historic Places was to be affected by the parking facility. Evidently, GSA did not contact the Council again. Meanwhile, the SHPO wrote to GSA and, in a seeming reversal, concluded that the project would not have an adverse effect on the historic district.

Sometime later, GSA prepared a supplemental EIS. Apparently, GSA had redesigned the parking area from surface parking to a multistory facility, for the EIS referred to a "parking deck" of four decks and a "vehicle maintenance facility." The supplemental EIS cited the SHPO's latest letter finding no adverse effect and concluded that the parking garage would have no effect on any property eligible for or listed in the National Register.

The city then brought suit, alleging that GSA failed to comply with NEPA, NHPA, and Executive Order No. 11593. The city objected to the design of the facility and claimed that the proposed multistory parking garage would indirectly affect the historic buildings by interfering with the view from Assembly Street toward those structures.

After a discussion of the standard of review to be applied in the case, the court first addressed the city's NEPA claims. The city alleged that the design changes that prompted GSA to prepare the supplemental EIS were significant enough to require GSA to prepare a separate EIS for the parking facility and that GSA's original and supplemental environmental impact statements were not sufficient to meet the mandates of NEPA.

The court determined that no new EIS was required for the parking facility for two reasons: its impact on the view of the historic structures from Assembly Street would be minimal or nonexistent because of the peculiar geographic configuration of the parking garage site, slip op. at 14, 17; and the city's aesthetic concerns with the design of the parking facility were not sufficient environmental impacts to necessitate another EIS. *Id.* at 16-17.

Second, the court rejected the city's claims that GSA had violated Executive Order No. 11593, which requires an

agency to locate, in consultation with the SHPO, properties that appear to qualify for inclusion in the National Register; to refer to the Secretary of the Interior for a determination of their eligibility for the National Register those properties for which an eligibility question exists; and to afford the Council an opportunity to comment on those properties determined eligible.

The court noted that the administrative record did not indicate whether GSA had actually referred the parking garage proposal to the Secretary of the Interior for an opinion. Nevertheless, the court found that GSA had satisfied the requirements of Section 2(b) of the Executive Order by affording the Council an opportunity to comment on the project. *Id.* at 19. [Ed. note: Presumably, this reference to the Council's "opportunity to comment" was to the Council's review of the EIS, *infra*.]

Third, the court disagreed with the city's contention that GSA did not comply with Section 106 of NHPA and the Council's regulations implementing Section 106, finding that GSA had taken into account the effects of the garage on the National Register properties because GSA had contacted the SHPO on several occasions requesting information on the historic resources of the area and his opinion of the effects of the project on the historic district, discussed the historic impacts in the EIS, and sought approval of the garage plans from a local landmark commission.

Additionally, the court found that GSA had complied with the requirement of Section 106 that the Council be provided an opportunity to comment because, after reviewing the EIS, the Council wrote to GSA thanking GSA for the opportunity to comment on the project. *Id.* at 20.

The court applied the definition of effect in the Council's regulations and concluded that a parking garage located in a depression, which might indirectly affect the historic properties by interfering with the view from Assembly Street toward the structures, was not an effect on the historic and architectural qualities that qualified the buildings for the National Register. Moreover, the court found that GSA had complied with Section 800.4(b) of the Council's regulations by consulting with the SHPO.

The court also rejected the city's argument that the Council's regulations were not met because the SHPO changed his mind on the effect of the project on the historic properties. Although consultation with the SHPO is required, SHPO approval of a project is not. *Id.* at 22.

Fourth, the court denied the city's request for injunctive relief, rejecting the city's arguments that it would be irreparably harmed by the garage because the location of the garage would interfere with the city's plan to create a greenbelt of parkland in that area. The court found that this potential harm was too tenuous, since the city had sold the land to GSA in the first place and had no funding for the greenbelt program. *Id.* at 23. The court also found harm to GSA in delaying the project because a construction contract for the garage had been awarded under which GSA was potentially liable for damages for each day of delay. *Id.* at 24.

Finally, the court held that the suit was barred by laches. *Id.* at 28. To determine whether plaintiff in an environmental case has unreasonably delayed, the lapse of time is calculated from the date of the final EIS until the date of the petition for injunctive relief. *Id.* at 25-26. If a supplemental EIS has been filed, the time is measured from that date. The percentage of the project completed at the time the lawsuit is filed is a proper factor for consideration in determining the applicability of laches. The city's wait of one and one-half years to file suit after the supplemental EIS was filed, during which the garage contract was awarded and the exterior of the office building completed, was found to have been too long. *Id.* at 26.

Moreover, the city failed to give GSA proper notice of its objections to the parking garage after the supplemental EIS was filed. *Id.* at 27. GSA would be prejudiced by an injunction issued after such a delay because the cost to GSA of abandoning or altering the proposed project would be substantial. The court concluded that the public interest clearly favored the construction of the parking garage on the selected site. *Id.* at 27. Although the court declined to enjoin GSA from building the garage, it cautioned GSA that the completed parking structure should not exceed the six stories currently planned. *Id.* at 28-29.

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Case 126

City of Grapevine v. Department of Transportation, 17 F.3d 1502 (D.C. Cir.), *cert. denied*, 115 S. Ct. 635 (1994).

The Dallas-Fort Worth Airport sought funds from the Federal Aviation Administration (FAA) to build two new airport runways, two new terminal buildings, and other facilities in order to accommodate increased airport demand. Several historic residences and a Main Street commercial district were located in the area of potential effect. FAA conditionally approved the expansion plan before Section 106 review was complete, provided that no expenditures for construction would be permitted until completion of Section 106 review. Three towns, a school district, and several area property owners sued FAA and the airport, under the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and Section 4(f).

Petitioners contended that FAA violated NHPA by approving the expansion prior to completion of the Section 106 process. Although the Section 106 process had been completed for the East Runway through a signed Memorandum of Agreement (MOA) addressing archeological impacts, Section 106 review had not been completed for the West Runway, which would have adverse noise effects in the historic district. Since the West Runway was scheduled for construction during a later phase of the expansion, FAA's "final approval" of the airport expansion plan was subject to a proviso that no expenditures would be permitted on the West Runway until after the FAA had conducted a "reevaluation" and the Section 106 process had been completed. 17 F.3d at 1503, 1508-09.

The court summarized the status of the Section 106 process, noting that much of it had taken place "after the FAA had issued its Decision." *Id.* at 1509. Approximately one year later, the FAA, the Texas Historical Commission, and the Dallas-Fort Worth Airport Board had entered into an agreement finding no adverse effect on historic properties. *Id.* The Council, however, disagreed with the finding of no adverse effect and requested consultation with FAA about alternatives and mitigation measures. *Id.* That consultation did not occur before the court decided the case.

Petitioners argued that the FAA's "conditional approval" violated NHPA, by failing to complete the process "prior to the approval of the expenditure of any Federal funds on the undertaking," as required by Section 106. The D.C. Circuit disagreed, determining that, because FAA's approval was conditional, FAA did not "approv[e]" the expenditure of Federal funds for the West Runway and, therefore, did not violate NHPA. 17 F.3d at 1509. However, the court noted that it was "desirable for the § 106 process to occur as early as possible in a project's planning stage . . . ." *Id*. Furthermore, the court pointed out that, if the airport committed resources to the project prior to completion of Section 106 review, it risked losing its investment if the review concludes with a finding of an adverse effect and FAA withdraws its approval. *Id.*

Petitioners also alleged that FAA improperly deemed several elements of the project as categorical exclusions in violation of FAA's regulations implementing NEPA. Although these elements were listed in FAA's regulations as exclusions, petitioners argued that FAA should have examined their effects nonetheless because the entire expansion project met several of the criteria listed by FAA as an exceptional circumstance requiring environmental review. FAA countered that it was not the entire expansion project, but merely the individual elements excluded that had to fall within FAA's list of exceptional circumstances. The court agreed with FAA's interpretation of its regulations and found that exceptional circumstances did not apply. *Id.* at 1504-05.

The court also rejected plaintiffs' argument that FAA failed to consider the cumulative impacts of related actions. Even though FAA deemed several elements of the plan as independent or speculative, the court determined that FAA had considered the cumulative impact of most of the elements; those elements not considered by FAA, however, could not be included in the approved airport layout plan. *Id.* at 1505-06.

Another challenge under NEPA was FAA's consideration of alternatives in its environmental impact statement.

Petitioners argued that FAA improperly defined the purpose of the project and that consideration of alternatives was circumscribed by the stated purpose. Specifically, petitioners challenged FAA's determination that the project's purpose included the economic development of the Dallas-Fort Worth area on the grounds that consideration of such a purpose was inappropriate. The court found that FAA acted properly in considering the sponsor's goals when evaluating the alternative courses of action and gave reasoned consideration to off-site alternatives. *Id.* at 1506-07.

Petitioners also took issue with the noise measurement technique used by FAA in determining whether the noise level produced by the airport expansion would constitute a constructive "use" under Section 4(f) of the Department of Transportation Act. Under Section 4(f), FAA can approve the use of historic sites only where no prudent and feasible alternative exists, and then only if the project includes all possible planning to minimize harm to the site. In assessing noise impacts, FAA relied on its traditional 65 Ldn guidelines, based on a weighted average of noise levels during a 24-hour day and night period, and determined that the historic site would not be "used" within the meaning of Section 4(f). There is no noise-level guideline specific to historic sites, but because the historic sites at issue in this case were residential properties, FAA used the level for residences.

With regard to the noise-level methodology, petitioners presented two arguments. First, they argued that single-event noise levels, not weighted averages, should be the basis for determining a constructive "use." The court rejected their arguments, deferring to FAA's choice of methodology. The court did consider, however, that FAA was undergoing the study of different methods of evaluating airport noise and had conducted a single-event noise analysis, even though it primarily relied on the Ldn average. *Id.* at 1507-08. Second, petitioners alleged that FAA noise guidelines were inappropriately applied to historic sites in that the standards for residential properties generally were not relevant in determining constructive "use" of the historic properties. The court observed that "the standard must bear some relevance to the value, significance, and enjoyment of the lands at issue." *Id.* at 1508 (quoting *Allison v. United States Department of Transportation*, 908 F.2d 1024, 1029 (D.C. Cir. 1990)). However, because the historic sites in this case were in use daily as residential properties, the court determined that the noise-level measurement for residential properties was appropriately used.

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Case 28

Coalition for Responsible Regional Development v. Coleman, 555 F.2d 398 (4th Cir. 1977).

This was a suit to enjoin construction of a bridge across a navigable river. Although no Federal funds were involved, the construction required a Coast Guard permit. The Coast Guard prepared an environmental impact statement under the National Environmental Policy Act and a Section 4(f) statement under the Department of Transportation Act. At that time, there were no properties listed in the National Register of Historic Places in the vicinity of the project. The Coast Guard nevertheless identified two historic properties in the area and concluded that neither would be affected. The Coast Guard notified the Advisory Council on Historic Preservation, as required by Section 106 of the National Historic Preservation Act, of the Coast Guard's determination of no effect, and the Council concurred in the determination. The plaintiffs attacked the environmental impact statement, the Section 4(f) determination, and the Coast Guard's Section 106 compliance.

The district court upheld the Coast Guard's actions. Without further explanation, the court concluded that the Coast Guard had complied with Section 106. The Fourth Circuit affirmed, finding no error in the Coast Guard's determination of no effect. 555 F.2d at 403.

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Case 46

Cobble Hill Association v. Adams, 470 F. Supp. 1077 (E.D.N.Y. 1979).

Citizens' associations brought suit to enjoin a highway repair project funded by the Federal Highway Administration (FHWA) until FHWA complied with the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and other environmental laws. The project did not entail extensions, additions, or changes to the highway but involved temporary detours that would pass through the surrounding community. Although the detours did not go through a historic district, plaintiffs alleged that the repair project would cause indirect or secondary harm to nearby historic districts.

The State Historic Preservation Officer (SHPO) had determined that the project would have no effect on the historic districts. Nevertheless, FHWA had attempted to comply with the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA by requesting a determination of no effect from the SHPO. Plaintiffs asserted that FHWA had violated NHPA and NEPA. The court denied plaintiffs' motion for a temporary restraining order. In considering plaintiffs' request for injunctive relief, the court found first that when there has been a determination of no effect under NHPA, judicial review is based solely on the administrative record that the agency has an affirmative obligation to develop. 470 F. Supp. at 1083.

Second, the court upheld FHWA's negative declaration under NEPA, stating that while the effects of the proposed repair of the existing highway were significant, they were not of a character to warrant an environmental impact statement, since they would not result in any long-term changes to the environment. Any environmental effects would be incidental to the repairs and temporary. *Id.* at 1086. Moreover, the effects on the structural stability of buildings in the area adjacent to the highway repair project did not warrant consideration under NEPA, although a different conclusion might be reached under NHPA. *Id.* at 1088.

Finally, the court noted that a Federal agency's obligations under NHPA and the Council's regulations are independent from the agency's responsibilities under NEPA. *Id.* at 1089. Although defendant's attempts to comply with NHPA may have been faulty, plaintiffs were not entitled to an injunction because NHPA does not apply to projects with only temporary effects resulting from maintenance and repair programs. *Id.* at 1090. The court perceived the threat to the historic districts to be indirect and insubstantial and upheld FHWA's determination of no effect. *Id.* at 1091.

The court dismissed the complaint.

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Case 87

Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985).

Plaintiffs, Indian tribes and an environmental organization, sought to enjoin the U.S. Army Corps of Engineers from issuing a permit to a developer for the placement of riprap along the western shore of the Colorado River in California. The purpose of the riprap was to stabilize the riverbank and establish a permanent boundary line for private property that the developer proposed to subdivide and develop into a residential and commercial community. The site of the development, known as the River City project, was directly across the river from the Colorado River Indian Reservation and directly south of additional portions of the reservation lying on the west side of the river. The land abutting the development site on the west was owned by the United States and administered by the Bureau of Land Management (BLM) of the Department of the Interior. The BLM land, an archeological district, included several significant cultural and archeological sites.

The developer applied to the Corps for the riprap permit in April 1978. The following fall, the Corps prepared an environmental assessment under the National Environmental Policy Act (NEPA) and concluded that, because significant impact upon the environment would result from the developer's proposed project, an environmental impact statement (EIS) should be prepared. The draft EIS was prepared and published in September 1979. In January 1981, the Corps informed the developer that a thorough cultural resources survey of resources on and near the proposed development site was needed before the Corps could complete the final EIS.

In June 1981, however, before the survey was begun, the Corps retracted the draft EIS as a result of changes in Corps policy regarding its jurisdictional authority and announced that no EIS and no further cultural resource evaluation were required. The Corps' decision to retract the draft EIS was apparently made in conformity with its proposed cultural resource regulations published in 1980, regulations that had never been adopted in final form or incorporated into the Code of Federal Regulations.

Under the proposed regulations, the Corps was required to assess both direct and indirect effects of its permits on properties listed or officially determined eligible for listing in the National Register of Historic Places. This review requirement extended beyond the area in which the permit would have direct physical effects to the "affected area," that area within which direct and indirect effects could be reasonably expected to occur.

For properties that were not listed or officially determined eligible for listing in the Register, but that might be eligible for the Register, the proposed regulations limited the Corps' review to the area within the Corps' jurisdiction‹the "permit area," defined as that area which would be physically affected by the proposed work.

The Corps issued the riprap permit to the developer on May 21, 1982. Plaintiffs then filed this action, alleging that the Corps failed to comply with NEPA and the National Historic Preservation Act (NHPA).

After discussing the factors that must be present for a preliminary injunction to be granted, the court addressed the likelihood of plaintiffs' success on the merits of their case. Defendants first contended that no EIS was necessary under NEPA because Federal involvement in the River City project was minimal and "major Federal action" was therefore lacking. The court disagreed, finding that NEPA requires assessment of both direct and indirect effects of a proposed Federal action on both "on site" and "off site" locations. 605 F. Supp. At 1433. That there was minimal Federal involvement in the project did not excuse defendants from compliance with NEPA, for "it is not the degree of Federal involvement that influences the standard of living of our society, but is instead the potential and degree of impact from development that bears upon the overall welfare and enjoyment of our society." *Id.* at 1432. "Major Federal action" does not have a meaning under NEPA independent of "significantly affecting the quality of the human environment." *Id.* at 1431.

The Corps' limitation of the scope of its environmental assessment of the bank stabilization activities and its resulting

conclusion that there would be no impact on cultural resources were improper and contrary to the mandate of NEPA. *Id.* at 1433.

The court next addressed plaintiff's claim that the Corps had violated NHPA by distinguishing between properties actually listed in or determined eligible for the National Register and properties that might be eligible for the Register and by affixing different historic review responsibilities to each. The court held that this distinction between properties and different scopes of responsibility was at odds with NHPA and the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA. *Id.* at 1438. Using the Council's definition of "eligible property" in Section 800.2 of its regulations as encompassing all properties that meet the criteria for inclusion in the Register, the court concluded that, in enacting NHPA, Congress intended to protect all properties that are of inherent historic and cultural significance and not just those that have been "officially recognized" by the Secretary of the Interior. *Id.* The court cited Executive Order No. 11593 and Section 110(a) of NHPA as support, finding that Federal agencies must exercise caution to ensure the physical integrity of those properties that appear to qualify for inclusion in the National Register. *Id.* at 1435.

The Corps' action in assessing the effects on properties that might qualify for inclusion in the National Register solely within the "permit area" and its failure to survey and consider the effects on like properties in the broader "affected area" was a breach of its responsibilities under NHPA. *Id.* at 1438.

Finally, the Court granted a preliminary injunction, finding that irreparable harm to cultural and archeological resources as a result of the development was possible. *Id.* at 1434-39.

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Case 20

Columbia Basin Land Protection Association v. Kleppe, 417 F. Supp. 46 (E.D. Wash. 1976).

Plaintiffs moved to enjoin the Bonneville Power Administration (BPA) from constructing a series of power transmission lines on the ground that BPA's environmental impact statement (EIS) was inadequate under the National Environmental Policy Act (NEPA). One of plaintiffs' arguments was that the EIS was inadequate because BPA had failed to comply with the National Historic Preservation Act (NHPA) and Executive Order No. 11593.

The court noted that NEPA requires agencies to consult with other Federal agencies with expertise on the effects of a proposed project. After briefly describing the requirement of Section 106 of NHPA that the agency afford the Advisory Council on Historic Preservation an opportunity to comment on proposed projects that may affect historic sites, the court concluded that BPA had fulfilled its obligations under NHPA and Executive Order No. 11593. 417 F. Supp. at 51. [Ed. note: The court offered no further analysis of the relationship of NEPA and NHPA and did not explain how it reached its conclusion.

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Case 17

Committee on Civic Rights of the Friends of the Newburyport Waterfront v. Romney, 518 F.2d 71 (1st Cir. 1975).

Plaintiffs sought to enjoin an urban renewal project funded by the Department of Housing and Urban Development (HUD) pending review of the project by the Advisory Council on Historic Preservation under Section 106 of the National Historic Preservation Act (NHPA). HUD completed the procedures set out in the Council's regulations implementing Section 106, and the district court dismissed the count as moot. Subsequently, plaintiffs sought costs and attorneys' fees from the local agency involved, arguing that the litigation resulted in public benefit and that NHPA represented a congressional policy dependent on enforcement by private attorneys general.

The Court of Appeals for the First Circuit affirmed the district court's denial of costs and attorneys' fees, holding that in the absence of express statutory authorization for granting costs and fees, Federal courts may award costs and fees only in cases of bad faith or in which there is benefit to a limited class of special beneficiaries against whom the award is taxed. Here, there was no basis for an award under either of these exceptions, and NHPA did not provide for awards of fees. 518 F.2d at 72. [Ed. note: NHPA was amended in 1980 to provide for the award of attorney's fees and costs.]

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Case 53

Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank, 497 F. Supp. 504 (N.D. Ala. 1980).

Plaintiff, a citizens' committee, brought suit to enjoin a Federal Reserve bank from demolishing the Fox Building, a building that the bank owned. The bank had acquired the building in 1978 as part of a long-range plan to obtain for future expansion of the bank all properties in the city block that contained the existing bank building and the Fox Building. The Board of Governors of the Federal Reserve System, of which the bank was a member, approved the acquisition in 1975. At the time of the acquisition, the bank was unaware that the Fox Building had any historic significance and so did not consider the architectural and historic impact of the acquisition on the building.

After it had acquired the property, the bank obtained approval from the Board of Governors for funds to demolish the building and began demolition in 1979. The city, however, abruptly suspended the demolition permit so that it could explore alternatives to demolition. During this time, the building was placed on the National Register of Historic Places. Although the city reissued the demolition permit soon after, the bank did not prepare an environmental impact statement under the National Environmental Policy Act (NEPA) and did not attempt to comply with the National Historic Preservation Act (NHPA). Plaintiff sought and obtained a temporary restraining order prohibiting the demolition.

On the merits, the court first held that plaintiff had standing to bring the lawsuit. The imminent demolition of the building constituted sufficient injury within the zone of interests protected by the Federal statutes involved. 497 F. Supp. at 509.

Second, the court found that the Federal Reserve bank was a Federal agency for purposes of NEPA and NHPA because of its own governmental character and because it was required to obtain approvals from the Board of Governors, also a Federal agency, for acquisition and demolition of the building. *Id.* at 509-10. A Federal Reserve bank, although a separate corporate body, is a fiscal arm of the Federal Government, created and operated in furtherance of national fiscal policy. It is not operated for profit, does not provide ordinary banking services, deposits its surplus earnings in the United States Treasury, and provides various services for the Federal Government. *Id.* at 510.

Third, although demolition of the building was a "major Federal action" under NEPA because the building was listed in the National Register, plaintiff had not presented evidence sufficient to show that the action would significantly affect the physical environment. Plaintiff showed only an impact on a historically significant building, which the court characterized as a "social concern." The court held that NEPA did not apply in such an instance. *Id.* at 511.

The court added that even if NEPA did apply, the claim must be dismissed because of laches. Plaintiff had waited almost two years after having at least constructive notice of the project, during which time defendants had spent a considerable sum of money, foregone the opportunity to explore alternate sites, and begun demolition. Plaintiff's delay was inexcusable, and maintenance of the lawsuit would cause undue prejudice to defendants. *Id.*

Finally, the court concluded that NHPA did not apply because the Fox Building was not listed in the Register at the time that the bank received approval for demolition funds and, although the building satisfied the criteria for eligibility for the Register set out in the Council's regulations, the building was not eligible because no Federal agency or State historical commission had found or determined it to be eligible. *Id.* at 512. Laches also applied to the NHPA claim. *Id.* at 513.

The court denied the requested injunctive relief. *Id.*

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Case 21

***Committee to Save the South Green v. Hills*, [1977] 7 Envtl. L. Rep. (Envtl. L. Inst.) 20,061 (D. Conn. Nov. 5, 1976).**

Plaintiffs, an unincorporated association and a corporation, sought to enjoin construction of a highway that was to be built in conjunction with an urban renewal project assisted by a Department of Housing and Urban Development (HUD) loan and capital grant under the Housing Act of 1949. The highway was to run through the South Green, a historic district placed on the National Register of Historic Places in 1975, and would require the demolition of the Mather House, a structure determined eligible for the Register in 1973. The grant contract was executed in 1970 and amended several times thereafter, but the project plans had remained unchanged since 1969. Although HUD approved demolition of the house, it did not prepare an environmental impact statement under the National Environmental Policy Act (NEPA) or seek the comments of the Advisory Council on Historic Preservation under Section 106 of the National Historic Preservation Act (NHPA). Plaintiffs obtained a temporary restraining order against the highway construction.

In considering plaintiffs' motion for a preliminary injunction, the court first determined that it had jurisdiction under the Administrative Procedure Act to hear the case. In a historic preservation case, the amount in controversy is not the amount that plaintiffs might recover at law but the value of the right to be protected or the extent of the injury to be prevented. The preservation of historic resources represents a considerable interest well in excess of the $10,000 jurisdictional amount. Slip op. at 8. [Ed. note: The $10,000 amount in controversy has since been abolished.]

Second, the court held that plaintiffs had standing to maintain the action because their members alleged use and enjoyment of the district that would be adversely affected by the highway project. This potential injury was within the zone of interests protected by NHPA. *Id.* at 9.

The court rejected the defense of laches even though the plans had remained unchanged since 1969. In considering a claim of laches, the issue is not how much earlier plaintiffs should have sued but whether injunctive relief pending compliance would still serve the public interest and the purposes of NHPA. Because the highway construction had not yet begun and the house was still standing, laches was no bar. *Id.* at 10.

On the merits, the court held that HUD should have complied with NEPA, since the grant contract was not signed until after NEPA took effect. Up until that time, HUD could have imposed preservation conditions on the contract. Furthermore, HUD retained discretion under the contract to effect changes in the project. *Id.* at 15-16.

The court then held that Section 106 of NHPA was not applicable, since the district was not listed in the Register until 1975, after the project had been initiated and HUD had begun dispensing money. *Id.* at 19. Nevertheless, HUD should have sought the Council's comments under the terms of the Council's regulations implementing Section 106 of NHPA, which require the agency to seek the Council's comments if a decision with respect to a proposed undertaking has an adverse effect on properties eligible for inclusion in the National Register. "Undertaking" includes both new and continuing programs, and "decision" means the exercise of authority at any stage in the undertaking at which alterations might be made to modify the impact on historic properties. Because HUD knew that the Mather House was eligible for inclusion in the Register and HUD's approval was necessary for the acquisition and demolition of the building, HUD should have complied with the Council's regulations. The court noted that the Council has a particular expertise in finding workable alternatives to the destruction and alteration of historic buildings and districts. *Id.* at 21.

The court issued a preliminary injunction. *Id.* at 23-24.

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Case 112

Commonwealth of Kentucky v. United States Army Corps of Engineers, No. 89-77 (E.D. Ky. Sept. 21, 1992).

The Commonwealth of Kentucky alleged that the Army Corps of Engineers failed to comply with the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) when recommending to Congress that the Corps divest itself of ten historic locks and dams along the Kentucky River and transfer their ownership to the State. The National Trust for Historic Preservation intervened in the case.

The Court did not address the merits of the NEPA claim, agreeing with Corps' arguments that the claims were not justiciable because the Commonwealth had failed to exhaust administrative remedies. The court stated, however, that it had reviewed the administrative record and, if it were to address the merits, it would still find in favor of the Corps.

According to the court, the Commonwealth was "unduly dilatory" in failing to raise its objections in 1981 when the Corps decided to place the locks and dams in caretaker status and again when the environmental assessment was prepared in 1982 and presented to Congress in 1985. The court pointed out that the facts respecting the 1981 decision had not changed and, accordingly, granted the Corps' motion for summary judgment on the NEPA claim.

The court also rejected the Commonwealth's NHPA claims, finding that the Corps had complied with Section 106 by participating in lengthy negotiations with the Kentucky State Historic Preservation Officer and attempting to enter into a Memorandum of Agreement (MOA), even though the Corps ultimately terminated consultation. Slip op. at 7-8.

The court observed that the Corps had also sought comments from the Advisory Council on Historic Preservation, although the Council took the position that the Corps had not submitted adequate documentation or involved interested parties in the consultation process. The court pointed out that the Council planned to consult with the General Services Administration (GSA), which would acquire title to the property prior to its disposal. Because the Council chose to continue the Section 106 process through the GSA, the court found that Corps' responsibilities under Section 106 had ceased.

The Commonwealth also raised claims under Section 110(a) of NHPA, arguing that that section required the Corps to rehabilitate buildings it was divesting. The court disagreed with this interpretation, finding that Section 110 did not require the rehabilitation of surplus property. Agencies must undertake preservation activities only when it is determined that the property will be of use to the agency's mission. *Id* at 9. [Ed. note: The language of Section 110(a) was revised in the 1992 amendments.]

Moreover, the court found that consistent with Section 110, the Corps had taken steps to prevent deterioration of the property. Finally, the court ruled in favor of the Corps on the Commonwealth's Section 111 claim, finding that the lease between the Corps and the Commonwealth adequately protected historic properties.

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Case 111

Communities, Inc. v. Busey, 956 F.2d 619 (6th Cir.), *cert. denied*, 506 U.S. 953 (1992).

Petitioners, community organizations representing neighborhoods near the Louisville, Kentucky, airport at Standiford Field, filed suit in the United States Court of Appeals for the Sixth Circuit seeking review of a Federal Aviation Administration (FAA) order which approved airport expansion plans. Plans called for the addition of two runways which would increase the airport's maximum capacity by 67 percent. After preparing an environmental impact statement (EIS), FAA approved plan funding in a decision issued in January 1991. Petitioners alleged that the EIS violated the National Environmental Policy Act (NEPA) because it did not address the project's cumulative impacts and failed to evaluate all reasonable alternatives and their environmental consequences, particularly with regard to the impact of airport noise on historic resources. Petitioners also claimed that FAA had violated Section 4(f) of the Department of Transportation Act because the project constituted a "constructive use" of properties entitled to protection. According to petitioners, FAA failed to seek comments on the project from the Advisory Council on Historic Preservation and, therefore, also violated the National Historic Preservation Act (NHPA). The court did not specifically address the NHPA claim.

Petitioners' challenge focused on FAA's use of the 65 Ldn contour to measure noise impacts of the proposed airport expansion. The 65 Ldn contour represents a weighted 24-hour average of all noise levels, rather than maximum single-event noise levels (SEL). Although FAA supplemented the Ldn measurements with an analysis of SEL, it ultimately relied on the 65 Ldn analysis in concluding the noise impacts did not result in constructive use of the neighborhoods.

Applying the arbitrary and capricious standard in reviewing FAA's decision, the court found that the agency did not abuse its discretion by using the methodology. Moreover, it noted that even if FAA were to use the SEL data, it was questionable whether noise impacts in this case constituted a constructive "use" given that the historic resources involved (a residential neighborhood and park) qualified for listing in the National Register of Historic Places because of their architectural importance. 956 F.2d at 624. Acknowledging that several other courts had recognized noise, in addition to noise combined with pollution and loss of views, as a constructive "use," the court determined that the rationale of those cases did not apply to the facts of the present case. *Id.*

The court also rejected petitioners' argument that FAA did not consider reasonable alternatives to the Standiford Field site, noting that the burden of suggesting a viable alternative was on petitioners. *Id.* at 625. Petitioners suggested that the expansion of the runway over a landfill was a reasonable option. FAA, however, had already considered that alternative and determined that it was "extremely inefficient." The court upheld FAA's conclusion that the petitioners' alternative was not feasible and prudent, and, therefore, that FAA did not violate Section 4(f) when it chose its method of expanding the airport. *Id.*

Under NEPA, petitioners alleged that FAA had segmented its analysis by failing to prepare a complete mitigation plan. Applying the precedent of *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), the court found that the final EIS prepared by FAA was sufficient because it identified and discussed potential measures for mitigating environmental impacts, even though it did not specify which measures would be used to mitigate those impacts. A fully developed mitigation plan, according to *Robertson*, is not necessary in preparing a final EIS. 956 F.2d at 626.

Petitioners also alleged that FAA failed to comply with NEPA when it did not consider as part of the proposed action the fact that 1,300 housing units in several adjacent neighborhoods were going to be demolished. The demolition was pursuant to a county urban renewal initiative which FAA treated as separate from expansion of the airport. The court pointed out that the county would have demolished the properties with or without airport expansion and, indeed, had begun to acquire the property at issue long before FAA approved the airport expansion. The court also observed that FAA analyzed county plans to acquire and demolish properties adjacent to the airport in its final EIS. Even if it had not, the county program had an independent utility. Thus, the court concluded that FAA was not required to reopen the EIS. *Id.*

As a final argument, petitioners contended that FAA failed to consider alternative sites for the airport expansion. The court examined the final EIS and determined that it properly included a discussion of alternatives and an analysis as to why each alternative was either imprudent or infeasible. The court also looked at the entire administrative record and found that it contained extensive documentation on alternatives. Based on that reasoning, the court of appeals denied plaintiffs' petition and affirmed FAA's decision.

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Case 154

Concerned Citizens Alliance, Inc. v. Slater, 176 F.3d 686 (3rd Cir. 1999).

Danville, Pennsylvania, which contains a historic district that was nominated to the National Register of Historic Places in 1994, is joined with Riverside, the town across the river, by a deteriorating bridge. In the early 1980s, several State and Federal agencies determined that the bridge needed to be replaced. Plaintiffs, the Concerned Citizens Alliance, a group of Danville area residents, sued over defendant Federal Highway Administration's (FHWA) selection of a particular bridge alignment that would send traffic through the Danville Historic District along Factory Street after it exited the new bridge.

Plaintiffs argued that FHWA failed to comply with the requirements of Section 4(f) of the Department of Transportation Act by arbitrarily and capriciously selecting the Factory Street Underpass alignment as the preferred alternative. Plaintiffs claimed that defendants ignored the conclusion of the Advisory Council on Historic Preservation (Council) that another alternative, the Mill Street Plus Bypass alternative, would minimize harm to the Danville Historic District. Additionally, plaintiffs alleged that defendants violated both Section 4(f) and the National Environmental Policy Act (NEPA) by failing to evaluate, in detail, the Mill Street Plus Bypass alternative, which would, in addition to rebuilding the current bridge, build a second bridge about a mile upstream. The second bridge would allow traffic to reach the connection to an interstate highway without going through the center of Danville. The district court granted summary judgment for defendants on all grounds, and this appeal ensued.

In determining whether the FHWA selection of the Factory Street Underpass alternative violated Section 4(f), the circuit court first considered the amount of deference that FHWA owes to the Council. The circuit court noted that the Council was an expert agency created to comment on federally assisted projects involving historic properties. Citing approvingly the decision in *Coalition Against a Raised Expressway, Inc. v. Dole* (see Case 95), the circuit court stated that "while the [Council's] recommendations do not and cannot control agency decision making, the relevant agency must demonstrate that it has read and considered those recommendations." The circuit court concluded that FHWA must take the Council's comments into account when weighing the alternatives, and must demonstrate that it gave the Council's conclusion genuine attention: "Congress did not create the [Council] so that it could be a toothless agency."

The circuit court then proceeded to consider whether defendants acted arbitrarily in concluding, pursuant to Section 4(f), that the Factory Street Underpass alternative would inflict the least amount of harm on the historic district. After analyzing each of the plaintiffs' arguments, and thoroughly reviewing the administrative record, the circuit court determined that the record supported FHWA's finding that the Factory Street Underpass alternative would minimize harm to the historic district. The circuit court stated that defendants had performed a large number of studies and weighed the results properly in selecting the preferred alternative. It also found that the record showed FHWA appropriately considered, and responded to, the Council's comments through studies of their own and joint drafting of a Memorandum of Agreement. Therefore, the circuit court held that defendants did not act arbitrarily or capriciously in their Section 4(f) selection of the Factory Street Underpass alternative.

Finally, the circuit court analyzed whether defendants violated NEPA. Plaintiffs contended that the Environmental Impact Statement (EIS) was inadequate because it failed to consider the Mill Street Pls Bypass alternative. NEPA requires that defendants only consider "reasonable" alternatives in the EIS. Courts have found that where an agency has examined other alternatives and leaves out those that do not meet the purpose and need of the project, the agency has satisfied NEPA. The circuit court found that FHWA had adequately determined that the Mills Street Plus Bypass alternative was not feasible due to a low use rate and its excessive construction and environmental costs. This alternative was not reasonable and, thus, did not have to be considered under the EIS.

The circuit court therefore affirmed the district court's grant of summary judgment for defendants.

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Case 95

Coalition Against a Raised Expressway, Inc. v. Dole, [1987] 17 Envtl. L. Rep. (Envtl. L. Inst.) 20,466 (S.D. Ala. Oct. 20, 1986), *affd*, 835 F. 2d 803 (11th Cir. 1988).

The Coalition Against a Raised Expressway (CARE), with the National Trust for Historic Preservation as intervenor, sought to enjoin construction of an elevated interstate highway connector near several historic districts and buildings, listed on the National Register of Historic Places, and a National Historic Landmark. Plaintiffs alleged that the Federal Highway Administration (FHWA) authorized construction of the elevated highway without properly fulfilling the requirements of the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), Section 4(f) of the Department of Transportation Act, and other statutes and regulations.

Pursuant to Section 106 of NHPA and its implementing regulations, FHWA had consulted with the Advisory Council on Historic Preservation but failed to reach a Memorandum of Agreement to mitigate the adverse effects of the project. Plaintiffs argued that FHWA failed to consider and properly respond to the Advisory Council's comments during the Section 106 process. The district court disagreed with plaintiffs, finding that although FHWA disagreed with the Council's comments, FHWA did consider the comments and, thus, complied with NHPA. The court explained that "defendants are not obligated to accept the Advisory Council's comments." 17 Envtl. L. Rep. at 20,472.

Although the district court found that FHWA complied with Section 106 of NHPA, it observed that compliance with "Section 106 does not necessarily satisfy the mandate of Section 110(f) . . . ." *Id*. Plaintiffs had alleged that FHWA did not comply with Section 110(f), which mandates that Federal agencies minimize harm to National Historic Landmarks to the maximum extent possible. The court reviewed the legislative history of Section 110(f) and found that when this section was added in 1980, the statutory responsibilities of Federal agencies were "significantly expanded." *Id*. The legislative history states that Section 110(f) "'establishes a higher standard of care to be exercised by federal agencies' than the standard under § 106 of NHPA . . . ." *Id*. (quoting H. Rep. No. 1457, 96 Cong., 2d Sess. 52 (1980)). Further explaining the relationship between Sections 106 and 110, the court noted that Section 110 does not supersede Section 106, but requires an agency to exercise a higher standard of care in agency planning when a project affects a National Historic Landmark. *Id*.

The district court did not render a final judgement on the Section 110(f) claim, however, because the court determined that compliance with Section 4(f) of the Department of Transportation Act would moot the Section 110(f) claim. The court ruled in favor of plaintiffs on the Section 4(f) claim, finding that FHWA's actions constituted a "constructive use" of the historic properties and, therefore, fell within the requirements of Section 4(f). *Id*. at 20,470. Based on a review of the evidence in the record, which included a recommendation from the Advisory Council that construction take place on the east side of the river to avoid adverse impacts on the historic properties, the court determined that FHWA's decision not to prepare a Section 4(f) statement was arbitrary and capricious and ordered FHWA to comply with the statute.

In addressing plaintiffs' NEPA claim, the district court observed that, unlike Section 4(f), the mandate of NEPA is procedural and the Federal agency "need not elevate environmental concerns over any other factor . . . ." 17 Envtl. L. Rep. at 20,469. The court found that FHWA adequately considered alternatives to the elevated expressway in its environmental impact statement (EIS). The court explained that when a Federal agency prepares an EIS "subjective impartiality is not required, so long as it does not taint the decisionmaker's good faith objectivity." *Id*. (citing *Movement Against Destruction v. Trainor*, 400 F. Supp. 533, 547 (D. Md. 1975)). Based on the record, the district court granted summary judgement in favor of FHWA on the NEPA claim. On appeal, the 11th Circuit affirmed the district court's ruling without addressing the two NHPA claims, since the parties had not raised those issues on appeal. 835 F.2d at 806 n. 4.

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Case 152

Corridor H Alternatives, Inc. v. Slater, 166 F.3d 368 (D.C. Cir. 1999).

Plaintiffs, Corridor H Alternatives, Inc., and several other environmental and public interest groups, challenged a highway project in West Virginia that had been developed and approved by various Federal agencies. Although study and planning for the Corridor H project, part of the Appalachian Highway Development System, dated from the late 1970s, the project was suspended until 1990 when the current planning efforts were initiated.

The Federal Highway Administration (FHWA) issued the Final Environmental Impact Statement (FEIS) in April 1996, which contained two agreements governing the implementation of the project, including a Programmatic Agreement (PA) establishing procedures for compliance with Section 106 of NHPA.

Plaintiffs filed suit claiming that defendant, FHWA, failed to adequately consider the alternative to improve and use existing roadways and that modifications in the project after the issuance of the FEIS mandated the preparation of a Supplemental Environmental Impact Statement (SEIS). They further questioned FHWA's approval of the project conditioned on eventual compliance with Section 4(f) of the Department of Transportation Act (DOTA) and alleged that the planned project would improperly use Section 4(f) sites.

Specifically, they asserted: 1) that FHWA violated DOTA Section 4(f) by failing to identify all the historic sites it was charged with protecting prior to its decision approving the route of the proposed highway, and by erroneously concluding that the highway would not "use" two of the sites it did identify; and 2) that the agency violated the National Environmental Protection Act by failing to give adequate consideration to the improvement of existing roads as an alternative to the construction of the new highway.

The district court held that the agency had complied with both statutes. In the decision granting defendant's motion for summary judgment, the appellate court noted that the record did not support plaintiffs' arguments that defendants failed to give substantial consideration to alternatives. Although the FEIS only included a limited discussion of plaintiffs' preferred alternative, that document references earlier studies where it was analyzed in detail.

The court also determined that FHWA had taken the required "hard look" and that plaintiffs could not show that FHWA's decision was arbitrary or capricious. While the court recognized that an agency must complete NHPA's Section 106 review before it can begin compliance with Section 4(f), it found that final approval of the project contingent upon compliance with the Section 106 PA satisfied defendant's responsibility to achieve "as certain compliance as possible" at the given phase of the project, and noted that implementation of the PA would ensure that full compliance was achieved before any construction begins in an area.

The court dismissed plaintiffs' arguments that defendant's condition approach defeated the purposes of Section 4(f), finding that FHWA had considered its approach in light of its regulations and that its interpretation of the statute and its regulations was reasonable and not plainly erroneous.

Additionally, the court held that while defendant may not have concluded Section 4(f) compliance for specific properties, it was clear that defendant had made a final determination about the non-use of Section 4(f) properties, and that determination was ripe for review.

In its concluding remarks, the court stated that nothing in its opinion should discourage plaintiffs from continuing to seek Mt. Graham's inclusion in the National Register of Historic Places, noting that this opinion may alleviate many of plaintiffs' concerns.

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Case 127

Daingerfield Island Protective Society v. Babbitt, 40 F.3d 442 (D.C. Cir. 1994).

Environmental organizations and individuals sued the Department of the Interior to set aside a land exchange agreement under which the National Park Service (NPS) granted an easement to a developer in exchange for title to wetlands. The developer planned to use the easement to construct interchange access to a parkway in order to facilitate a major mixed-use development along the Potomac River. The agreement provided that the interchange design would be approved by NPS, the National Capital Planning Commission (NCPC), and the Fine Arts Commission. Plaintiffs argued that the exchange agreement and the interchange design approval violated various Federal laws, including the National Park Service Organic Act (NPSOA), the National Historic Preservation Act (NHPA), the National Capital Planning Act (NCPA), and Executive Order No. 11988, which protects flood plains.

First, the court of appeals held that the Tucker Act's six-year statute of limitations barred plaintiffs from challenging NPS' decision to enter into the lease exchange agreement. Defendants had stated the affirmative defense with sufficient specificity by summarily stating that "plaintiffs' claims are barred by the applicable statute of limitations." 40 F.3d at 444. Further, the court stated that because the defense was appropriately raised in the defendant's answer, it was not waived by the defendant's failure to reassert the defense in its subsequent summary judgment motion. *Id.* at 445.

Next, the court addressed plaintiffs' allegations regarding the interchange design. The court found that the interchange design approval did not violate NPSOA, which requires NPS to promote the use of national parks. The court interpreted the act as giving NPS broad discretion in deciding how to protect park resources. According to the court, NPS had properly considered various designs and their effects on the environment; thus, NPS' determination was not arbitrary, capricious, or an abuse of discretion and was based on a reasonable construction of the law. *Id.* at 446.

With regard to NHPA, plaintiffs alleged that although NPS had consulted with the Advisory Council on Historic Preservation and obtained Council approval of the interchange design, it had not provided adequate information about historic properties. Specifically, plaintiffs claimed that NPS failed to inform the Council that the project would affect historic Alexandria, Virginia, located nearby. The court reasoned that the Council was aware of the location of the proposed interchange and its proximity to Alexandria and, if it had deemed it important, could have requested more information about the project's effects or considered the effects *sua sponte*. Because the Council acted on the information before it and approved the design, the court found that NPS had complied with NHPA. *Id*. at 446-47.

Plaintiffs' NCPA claim alleged that the NCPC inappropriately approved the interchange design after preliminarily finding that any interchange would be inconsistent with its comprehensive regional plan. The court of appeals found that the NCPC had fulfilled its statutory duty to advise Federal agencies on the effects of their projects and had objectively examined the design and properly expressed its views. *Id*. at 447.

Finally, the court found that NPS had fulfilled its obligations under Executive Order No. 11988 by considering various alternatives to the interchange design, including the no build alternative, and incorporating design changes to mitigate adverse effects on the flood plain.

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Case 150

Davis v. Latschar, 1998 WL 968474 (D.D.C. Dec. 31, 1998), Docket No. CIV.A. 97-0232 PLF.

The National Park Service (NPS) sought to reinitiate its deer management program at Gettysburg National Military Park and Eisenhower National Historic Site. The program, in effect during 1996 and 1997, called for park rangers to shoot deer in a controlled harvest to maintain population density. NPS suspended the program in July 1997 because of this lawsuit, and stipulated that it would not reinitiate the program without an order from the court. This case involves their request for such an order.

Plaintiffs, Davis et al., argued that the court should enjoin the deer management program because defendant, NPS, had acted contrary to the NPS Organic Act, its own management policies implementing that act, the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA). After finding that NPS had acted consistently with the Organic Act and its implementing guidelines, and that it had complied with the procedures of both NEPA and NHPA, the court granted summary judgment for NPS, permitting it to reinitiate its deer management program.

After this suit was initiated, NPS moved to stay the litigation, arguing that it would eliminate the issues in the lawsuit by suspending the program while revisiting its compliance with the applicable laws. NPS also revealed that it had already initiated procedures to comply with NHPA requirements. NPS argued in the summary judgment motion that it had completed what it believed to be a sufficient NHPA process. It first concluded that the program would have "no adverse effects." It then sought the concurrence of the State Historic Preservation Officer (SHPO), who agreed that there would be "no adverse effects." It used the same process to seek the approval of the Advisory Council on Historic Preservation (Council), who also agreed.

Although plaintiffs did not argue that NPS failed to comply with Section 106 requirements, they asserted that NPS violated the Administrative Procedure Act (APA) by making an arbitrary and capricious decision of "no adverse effect" without considering a "relevant factor." Plaintiffs' primary argument was that the deer management program's effect on Gettysburg's "quiet contemplative atmosphere" (the "relevant factor") was an adverse effect under Section 106, and was not considered by the reviewing parties. The argument was based on an excerpt from a National Register of Historic Places publication, *Bulletin No. 40.*

However, after reviewing the record, the court concluded that all parties considered the argument. It did state that although the SHPO and the Council did not use those exact words, they did consider that contention through a recharacterization of the argument. The court found that this recharacterization, coupled with the reviewers' concurrence with NPS's finding of "no adverse effect" on Gettysburg's setting, feeling, or association, suggested that the SHPO and the Council fully considered plaintiffs' submissions, and ruled that NPS had complied with the requirements of APA in its review of the effects of the management program pursuant to NHPA. The court issued an order allowing NPS to reinitiate its deer management program.

Plaintiffs filed a motion for the court to amend and reconsider the ruling summarized above. In its opinion regarding this motion, the court asserted that the "quiet, contemplative atmosphere" factor advanced by plaintiffs was not even a "relevant factor" that would need to be considered for the "no adverse effect" finding. An "adverse effect" finding regarding a property's setting is reached "when that character contributes to the property's qualification for the National Register." Section 800.9(b)(2). The court reasoned that a "quiet contemplative atmosphere" was not among the listed National Register criteria.

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Case 34

***District of Columbia Federation of Civic Associations v. Adams*, 571 F.2d 1310 (4th Cir. 1978).**

A citizens' group opposed the construction of an interstate highway in northern Virginia designed to carry traffic into the District of Columbia on grounds that the Department of Transportation (DOT) had not complied with various environmental laws, including the National Historic Preservation Act (NHPA) and the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA.

DOT had ascertained that the project would have no effect on historic resources in the District of Columbia but had not identified any District of Columbia historic properties. Instead, DOT chose to identify only properties in Virginia. Moreover, the agency had decided that even if there were historic properties in the District of Columbia which would be affected, the project would cause no adverse effect on those properties. DOT had furnished a copy of its environmental impact statement (EIS) prepared under the National Environmental Policy Act to the Council, however, and invited the Council's comments on the EIS.

The court concluded that although DOT had not adhered to the Council's regulations, this failure did not justify injunctive relief. 571 F.2d at 1313. DOT had complied with NHPA by providing the Council with an opportunity to comment on the EIS. *Id.* at 1313-14.

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Case 6

***District of Columbia Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir.), *supp. op.*, 459 F.2d 1263 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).**

Plaintiffs challenged the construction of a bridge to be built across the Potomac River at the Three Sisters Islands near the Georgetown Historic District in Washington, D.C., an area listed in the National Register of Historic Places. They asserted that the Department of Transportation (DOT) had not complied with Section 15(a) of the Federal-Aid Highway Act and that the decision to go ahead with the project was the result of undue political pressure. Members of Congress had threatened the agency with a cutoff of funds if the project did not proceed.

The court held that under Section 15(a), before the project could begin, DOT must determine that all possible planning had been done to minimize harm to the affected historic district. Because the final design for the bridge had not been completed, it was premature for DOT to assert that it had complied with Section 15(a). The expectation that future planning would result in minimal harm to the historic area was not sufficient. Moreover, DOT erred by failing to consult with other planning agencies to coordinate efforts to minimize harm to the historic district. 459 F.2d at 1239.

The court also found that DOT's determinations were invalid because they had been made as a result of undue political pressure from members of Congress who had clearly threatened the agency with fiscal reprisals if it did not approve the bridge project. *Id.* at 1245. In enacting the Federal-Aid Highway Act, Congress did not intend for the agency to consider such threats in reaching decisions on bridge projects. *Id.* at 1247.

The court remanded the case to the district court, directing it to enjoin construction until DOT could comply with Section 15(a). *Id.* at 1249. The court also asked the litigants to submit supplemental briefs on the applicability of the National Historic Preservation Act (NHPA) and other statutes. After these had been received, the court issued a supplemental opinion, concluding that DOT must comply with Section 106 of NHPA and afford the Advisory Council on Historic Preservation an opportunity to comment before final approval of the project. 459 F.2d at 1265.

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Case 29

***Dixon v. Coleman*, No. A-C-77-24 (W.D.N.C. May 4, 1977).**

Plaintiffs brought suit to enjoin the construction of a portion of an interstate highway, alleging that the Secretary of Transportation had violated the National Historic Preservation Act, Executive Order No. 11593, Section 4(f) of the Department of Transportation Act, and Section 15(a) of the Federal-Aid Highway Act by failing to consider the effects of the project on a nearby historic house known as Zealandia. The highway route was to pass near the house but not through the estate. Plaintiffs' concerns were that blasting associated with the project would damage the house.

During the planning stages, defendants had consulted with State agencies and were told that there were no historic sites that would be affected by the project. Later, the Department of Transportation learned from the Advisory Council on Historic Preservation that Zealandia might be eligible for the National Register of Historic Places. Soon after, the construction contract was awarded and construction began. The State Historic Preservation Officer then concluded that the house was qualified for the Register. Zealandia was actually placed on the Register while the lawsuit was in progress.

The court denied plaintiffs' motion for a preliminary injunction, finding that plaintiffs were not likely to succeed on the merits of their case. Not only did the evidence show that defendants had complied with the applicable laws, but plaintiffs had produced no convincing evidence at trial that the blasting would damage Zealandia. In addition, the project had reached a stage at which compliance with the environmental and historic preservation laws would no longer have force or meaning. Slip op. at 14.

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Case 18

Don't Tear it Down, Inc. v. General Services Administration, 401 F. Supp. 1194 (D.D.C. 1975).

A citizens' group brought an action to restrain the General Services Administration (GSA) from demolishing the Winder Building, the Winder Annex, the Riggs Bank Building, and the building occupied by the Nichols Cafe in Washington, D.C., to make way for the construction of a new office building. The Winder Building was listed in the National Register of Historic Places, and the other three buildings were possibly eligible for the Register. GSA had advised the Advisory Council on Historic Preservation that it intended to destroy the buildings, but when the Council pointed out to GSA that the three latter buildings might be eligible for the National Register of Historic Places and that GSA should comply with Section 106 of the National Historic Preservation Act (NHPA), GSA failed to respond to the Council's letter. After the Council requested the Secretary of the Interior to make a determination of the eligibility of the buildings for the Register, the Secretary found the buildings to be eligible and so notified GSA. GSA responded by informing the Council that it had decided to demolish the buildings but was willing to participate in the Council's consultation process.

After one consultation meeting in February, the parties determined that the matter should be heard by the full Council at its May meeting. Meanwhile, GSA began demolition, and plaintiffs obtained a restraining order preventing further demolition. The Council then rescheduled its meeting for April to allow the process to move more expeditiously. At that meeting, the Administrator of GSA asserted that he had gone ahead with demolition before completing the Council's process because he believed that GSA, the Council staff, and the Council would be unable to agree, that further consultation was futile, and that GSA therefore did not have to comply with Section 106 or the Council's regulations. After the Council had issued its comments, GSA moved to dismiss the lawsuit as moot.

The court found that the actions of GSA prior to the Council meeting were in contravention of the policies expressed in NHPA and the Council's regulations. Since that time, however, GSA had complied with the law and had apologized for its conduct. The court, while expressing its hesitation, therefore concluded that the case was moot and dismissed the action. 401 F. Supp. at 1199.

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Case 54

***Don't Tear it Down, Inc. v. Pennsylvania Avenue Development Corporation*, 642 F.2d 527 (D.C. Cir. 1980).**

The Pennsylvania Avenue Development Corporation (PADC), a Federal agency, was created in 1972 by the Pennsylvania Avenue Development Corporation Act to orchestrate the redevelopment of Pennsylvania Avenue in Washington, D.C. Under the act, PADC prepared a development plan for the avenue that was approved by Congress. The act declared that PADC must carry out activities on Pennsylvania Avenue in accordance with the development plan but must also comply with District of Columbia laws in constructing any project.

As envisioned by the development plan, PADC acquired the Munsey Building and applied to the District of Columbia for a permit to demolish the building. Because the structure stood in an area designated as historic under District law, the District required PADC to comply with the District's Historic Landmark and Historic District Protection Act before PADC could obtain the demolition permit. Because PADC had not complied with this law at the time it submitted its application for a demolition permit, the application was "referred for a ruling." Meanwhile, PADC, the District Historic Preservation Officer, and the Advisory Council on Historic Preservation had entered into a Memorandum of Agreement (MOA) under the Council's regulations implementing Section 106 of the National Historic Preservation Act on the development project. Just as the District government was preparing to issue the permit, plaintiff, a preservation group, instituted this action seeking to prevent demolition of the building. Plaintiff claimed that the MOA had been violated and that PADC was required to comply with the local preservation law.

The D.C. Circuit affirmed the district court's refusal to grant the requested relief with respect to the MOA. 642 F.2d at 531. Treating the MOA as a contract, the court deferred to the interpretation placed on the MOA by the parties to the agreement that some of the provisions of the MOA were inapplicable. Moreover, the court found that other provisions of the MOA had been satisfied or substantially satisfied, thus mooting any necessity for an injunction. *Id.* at 531 n. 49.

Second, the court examined the PADC act and the development plan and concluded that Congress did not intend that PADC should be required to comply with the District's historic preservation law. Because the local preservation law would have allowed the District government to obstruct, by denying permits, achievement of an explicit congressional objective‹the development plan‹the court found the local law to be incompatible with the act. When Federal and local laws conflict, the Federal law prevails unless Congress has expressed a clear intent that the local law should take precedence. *Id.* at 530-38.

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Case 22

Edwards v. First Bank of Dundee, 534 F.2d 1242 (7th Cir. 1976).

This was an action against a State bank to enjoin it from demolishing its privately owned building, the Brinkerhoff House, a property not listed individually in the National Register of Historic Places but located within the Dundee Township Historical District, listed in the Register in 1975. The house had been included on the nomination form submitted for the listing of the district. The bank had contracted to buy the house more than a year before the district was listed in the Register, although it did not take title until after the listing. The bank proposed to demolish the house with private funds only.

The bank was an insured bank under the provisions of the Federal Deposit Insurance Act (FDIA). Under the act, the bank had applied to the Federal Deposit Insurance Corporation (FDIC), a Federal agency, for permission to relocate its business to the block occupied by the historic structure.

Plaintiffs alleged that FDIC was required to comply with the National Historic Preservation Act and the National Environmental Policy Act prior to approving the bank's request for change of location. The district court agreed and granted a preliminary injunction.

The Seventh Circuit reversed. The court noted that the bank's undertaking was not federally funded or assisted, no Federal officer had been joined as a party defendant, and the Comptroller of the Currency had no authority under the FDIA to grant or deny a Federal license to demolish a privately owned building. 534 F.2d at 1245-46. Whether the Comptroller grants or denies the bank's application to transfer its location is immaterial. *Id.* at 1246. [Ed. note: The court did not explain the relationship between the FDIC and the Comptroller.]

The court therefore concluded that the district court did not have jurisdiction over plaintiffs' claims against the bank and ordered the district court to dismiss the case. *Id.* at 1246.

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Case 108

El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991).

Plaintiff sued the Rural Electrification Administration (REA) to halt construction of an REA-financed electrical power substation adjacent to the location where El Rancho residents performed traditional Hispanic dances. Plaintiff claimed that the site was the traditional center of the El Rancho community. The substation was being constructed by a local electrical co-op on land leased to the co-op by the Pueblo with the approval of the Bureau of Indian Affairs (BIA). Plaintiff alleged that REA approved funding for the project without complying with the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA). Plaintiff also claimed that BIA was required to comply with NHPA before approving the lease for the site.

As part of the loan application process, the co-op submitted to REA a work plan and a borrowers' environmental report describing the project, even though the project's exact location had not yet been selected. REA determined that the project qualified as a categorical exclusion under NEPA, approving the project and releasing funds on the condition that the co-op follow recommendations made by the State Historic Preservation Officer (SHPO) to conduct an intensive cultural resource survey prior to construction. Indeed, in the environmental report the co-op committed to consult with the SHPO in choosing the project site, if avoidance was not practical and, further, to advise REA if the project would affect any property eligible for the National Register of Historic Places. REA did not, however, ensure that the co-op had complied with the condition and the commitment it made. The co-op began construction without performing the recommended survey or consulting further with the SHPO.

The local community became aware of the project's precise location and scope when construction began. Residents petitioned the co-op to cease the project and meet with the community. In response to such requests, the co-op hired an archeologist to conduct a survey, but by that time 90 percent of the ground had been disturbed. The archeologist recommended that the co-op cease activity until the Section 106 process had been completed, although the survey found no eligible sites in or near the project boundaries. Based on the archeologist's report, BIA made a no effect determination. The SHPO did not concur and subsequently notified BIA and REA that, because the project would impact a traditional cultural resource, the agencies should begin consultation to resolve adverse effects.

The district court found that irreparable injury would occur if the preliminary injunction were not issued. Observing that both REA and BIA had violated NHPA by approving the project and allowing construction before consultation with the SHPO and the Council was completed, the court also found that REA had violated NEPA by inappropriately identifying the project as a categorical exclusion. If the agencies had adhered to NHPA's consultative requirements, the court noted that they would have been aware of the project's potential to affect a traditional cultural resource; under those circumstances an environmental impact statement (EIS) was appropriate. Slip op. at 17.

REA's categorical exclusion decision was unreasonable, the court found, because it was based on a plan that did not identify the construction site. *Id.* at 18. As time progressed it would be more difficult to salvage the integrity of the site, the court determined. Therefore, irreparable injury would occur if the injunction were not granted.

The court rejected defendants' argument that irreparable injury was outweighed by the damage to the defendants if the injunction were issued, finding the need for the new substation was not as immediate and dire as the defendants claimed. Further, the court observed that the co-op had represented that it would assume responsibility for complying with NHPA when it obtained REA approval for financing but proceeded with construction without fulfilling its known duty. Thus, the co-op could not now claim harm. *Id.* at 21.

With regard to the public interest prong of the preliminary injunction test, the court found that enjoining construction would serve the public interest by ensuring that defendants would reconsider their decision with public involvement. Finally, the court determined that plaintiff had already succeeded on the merits of its claims that defendants violated NEPA and NHPA and that the remaining concern over the eligibility of the adjacent land and the moving of the

substation were serious, substantial, and difficult issues for litigation. *Id.* at 23.

The district court addressed defendants' laches claim by finding that plaintiff did not unreasonably delay the law suit. The court reasoned that defendants' conduct precluded notice and opportunity for the public to make its concerns known earlier. Once made aware of the project, plaintiff acted swiftly. Additionally, the court found that defendants were not prejudiced because they continued with the construction while aware of plaintiff's concerns. Moreover, the district court found that defendants' ripeness claim was also without merit.

Defendants argued that, because they were now willing to cooperate with the SHPO and the Council, the court should allow the administrative process to proceed without intervention. The court rejected this argument after noting that the agencies had not been willing to cooperate until the lawsuit and injunction motion were filed. The court also rejected defendants' mootness claim, finding that the damage done by defendants could be reversed and the site salvaged.

As a final matter, the court found that the organization had standing to sue because it showed it would be adversely affected by the agencies' actions. The court also denied a motion to dismiss which defendants argued was appropriate because private parties have no obligations to comply with NEPA and NHPA. Private parties may be enjoined when a project is financed with Federal money, the court pointed out. In any event, the co-op had represented to REA that it would complete the Section 106 process, and REA approved the financing on that condition. *Id.* at 27.

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Case 3

Ely v. Velde (Ely I), 321 F. Supp. 1088 (E.D. Va.), *aff'd in part, rev'd in part*, 451 F.2d 1130 (4th Cir. 1971).

This was an action to enjoin construction of a penal facility in the Green Springs area of Virginia, an area containing many historic properties, some of which were listed in the National Register of Historic Places. The facility was to be financed in part by a block grant from the Law Enforcement Assistance Administration (LEAA), an agency within the Department of Justice. Plaintiffs, who were residents of the area and members of a historic preservation organization, alleged that LEAA was required to comply with Section 106 of the National Historic Preservation Act (NHPA) and to prepare an environmental impact statement under the National Environmental Policy Act (NEPA). LEAA contended that the Omnibus Crime Control and Safe Streets Act, the statute under which the Federal grant was made, exempted the agency from NHPA and NEPA. The State of Virginia, also a defendant, alleged that neither of these statutes applied to the State agencies involved.

The district court held that the plaintiffs had standing under the Administrative Procedure Act to bring the suit because they had exhibited sufficient injury-in-fact and their interests were within the zone of interests to be protected by NHPA and NEPA. They had alleged injury to the public interest, enabling them to act as private attorneys general as well. The Safe Streets Act does not preclude judicial review. 321 F. Supp. at 1092. This holding was not challenged on appeal.

The Safe Streets Act provides that block grant funds can only be withheld if LEAA finds that the grantee has failed to comply with the act, LEAA's regulations implementing the act, or the State plan that the State submitted to LEAA in applying for the grant. The act leaves no discretion with the agency to deny the funds for other reasons or to condition the grant. The policy underlying the act is to assist local law enforcement agencies without imposing any Federal control over their operation. LEAA argued that it need not comply with NHPA because it was prohibited by the Safe Streets Act from imposing any conditions on the grant recipient. Although the district court agreed with LEAA that the two statutes were irreconcilable, the Court of Appeals for the Fourth Circuit did not agree and reversed the district court on this point.

The appellate court noted that "in the absence of unmistakable language to the contrary," it could not assume that the Safe Streets Act canceled NHPA. Because there was no such language in the Safe Streets Act, the court concluded that the two statutes were not irreconcilable. 451 F.2d at 1136. An LEAA requirement that every State plan and grant application must contain enough information to assess the environmental and cultural impact of the proposed plan or grant would not frustrate the "hands off" policy of the Safe Streets Act. Moreover, LEAA had coordinated its Safe Streets Act activities with several other Federal statutes, and the court did not believe that compliance with the additional requirements imposed by NHPA would undercut the goals of the Safe Streets Act. *Id.* at 1137. For the same reasons, the court concluded that LEAA must comply with NEPA. *Id.* at 1137-38.

The court declined to rule on the merits of the proposed facility, finding that the purpose of NHPA and NEPA is to place consideration of such issues in the Federal administrative forum and that the decision on whether to proceed was therefore up to the agency. Nevertheless, the court noted that a Federal agency obligated to take into account the values that NHPA and NEPA seek to safeguard may not evade its obligations by keeping its thought processes under wraps. LEAA not only must observe the required procedures, but it must also make a detailed record of its efforts to take historic and environmental values into account. *Id*. at 1138.

The Fourth Circuit rejected plaintiffs' argument that the State should also comply with NHPA, holding that NHPA imposes duties only on Federal agencies. The court declined to consider plaintiffs' claim that the United States Constitution had been violated by the defendants' decision in siting the facility. *Id.* at 1139.

The appellate court remanded the matter as to the Federal defendants and affirmed the district court's denial of an injunction against the State defendants. *Id.* [Ed. note: See *Ely v. Velde (Ely II)*, 497 F.2d 252 (4th Cir. 1974), Case No. 12 in this report.]

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Case 13

Environmental Defense Fund v. Tennessee Valley Authority, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd per curiam*, 492 F.2d 466 (6th Cir. 1974).

Plaintiffs began this action to enjoin the Tennessee Valley Authority (TVA) from completing construction of the Tellico Dam Project, which would affect Fort Loudoun, a historic fort, and some archeological sites. The court had granted a preliminary injunction directing the agency to comply with the National Environmental Policy Act (NEPA). TVA then prepared an environmental impact statement (EIS) under NEPA that plaintiffs alleged was inadequate.

The court dissolved the preliminary injunction, finding that the environmental impact statement was adequate. TVA had conducted archeological surveys of the project area and included in the EIS a sufficiently detailed discussion of the effects of the project on historic properties. 371 F. Supp. at 1008. Without further explanation, the court concluded that both the EIS and the evidence showed that TVA had complied with the National Historic Preservation Act. *Id.* at 1015.

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Case 35

Evans v. Train, 460 F. Supp. 237 (S.D. Ohio 1978).

Plaintiffs moved for summary judgment to enjoin the Environmental Protection Agency (EPA) from funding and constructing a sewage treatment plant on the Olentangy River in Ohio. The proposed facility was to be located across the river from the Highlands Metropolitan Park, which contained three archeological sites listed in the National Register of Historic Places.

EPA had determined that the project would have no effect on the sites and so had not requested the comments of the Advisory Council on Historic Preservation as required by Section 106 of the National Historic Preservation Act (NHPA). EPA had prepared an environmental impact statement under the National Environmental Policy Act, however, which noted that the project might have some impact on the park.

The court found that the record revealed that genuine issues of fact existed with respect to NHPA compliance and denied summary judgment. The record contained ambiguous letters from the State Historic Preservation Officer regarding the project and no indication of how the results of archeological surveys were treated; it also left unclear the impacts of the project on the archeological sites. 460 F. Supp. at 246.

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Case 136

Fein v. Peltier, 949 F. Supp. 374 (D.C. V.I. 1996).

Plaintiff, Fein, sought a preliminary and permanent injunction barring defendant, a National Park Service (NPS) Superintendent, from interfering with a residential construction. The court found that the plaintiff had not exhausted administrative remedies and that there was no final decision to review. Accordingly, the court held it lacked subject matter jurisdiction, and dismissed the action.

Plaintiff was assigned a property right in 1991 stemming from a 1975 deed conveying the property in question to the United States as part of approximately 94 acres to be included in the Virgin Islands National Park. The deed conveyed the land subject to a right of use and occupancy reserved by the grantors for a period of 60 years, which was assigned to plaintiff. This right included the right to construct a single family dwelling so long as it did not interfere with the historic ruins within the area, and also required the grantor to cooperate with NPS.

In 1994, Fein applied through the Department of Planning and Natural Resources (DPNR) for a minor Coastal Zone Management permit to build a residence. NPS never received formal notice, but found out and put DPNR on notice of its interest in project, warned of the project's possible impact on historic ruins on the land, and protested that the architectural plans did not conform to the restrictions on the mentioned deed. Although no evidence was presented that DPNR ever directly responded to NPS, Fein was required to adjust the plans to meet certain standards. The plans were revised and approved by DPNR and the permit was issued. An adjoining landowner who had not received proper notice successfully appealed to the Virgin Islands Board of Land Use Appeals, the initial permit was voided, and the permitting process started anew.

This time, NPS received an official notice from DPNR of Fein's renewed application. NPS responded with a letter advising it of the potential impact on historic properties and the need to comply with the National Historic Preservation Act (NHPA) and the Section 106 process. DPNR did not respond to the letter, and issued the permit before NPS could complete the Section 106 compliance procedures. The commissioner of DPNR then informed NPS that the permit was granted because Section 106 did not apply since the construction of the dwelling was not a Federal undertaking.

When Fein's contractor began site preparation, NPS officers entered the construction site and ordered the contractors to cease all site preparations or risk going to jail. Plaintiff brought this lawsuit seeking equitable relief, including a temporary restraining order (TRO). The TRO was granted on condition that no historic ruins would be disturbed. At the hearing for the permanent and preliminary injunction, it was revealed that the contractor had disturbed some of the ruins by moving a historic stone wall.

The court ruled from the bench that a permanent and preliminary injunction would not be granted and the matter would be dismissed for lack of subject matter jurisdiction. The issue of jurisdiction turned on whether Section 106 of the NHPA and the Archeological Resources Protection Act were applicable. The court found that they were applicable. The court concluded that Section 106 applied for two reasons. First, the court reasoned that, pursuant to Section 110(a) of the NHPA, NPS is required to manage and maintain property it owns to preserve historic, archeological, architectural, and cultural values in compliance with Section 106. Also, the court found that NPS is required by Section 106 itself to take into account the effects that plaintiff's project will have on the construction site, which is located on a property listed on the National Register.

In reaching these conclusions, the court found that this was an "undertaking" for purposes of Section 106. It construed the statutory definition of "undertaking" to include any project or activity under the direct or indirect jurisdiction of NPS that requires its prior approval, regardless of whether the project or activity is funded in whole or in part by the NPS.

Once the court found that Federal law required NPS to conduct a Section 106 review of the project, it considered whether such review had been completed. At the time the matter was before the judge, a dispute in the Section 106 process (regarding an adverse effect finding) had yet to be resolved by the Advisory Council. Accordingly, the Section 106 review was still in progress. The court therefore concluded that the plaintiff had not exhausted all administrative remedies before seeking relief from the court, and that the court did not have before it a final decision to review.

In addition, the court ruled that even if it had proper jurisdiction, plaintiff would not have been entitled to equitable relief because he had not come to the court with clean hands. By violating the restrictions on the temporary restraining order that this court issued, the plaintiff was seeking equitable relief with unclean hands, violating a long-established rule of equity.

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Case 103

***Ferris v. Secretary of the United States Department of Transportation*, No. 89-C-779-C (W.D. Wis. July 30, 1990).**

Private citizens and preservation organizations sought injunctive relief against the United States Coast Guard and the Department of Transportation (DOT) to stop the solarization of the Devil's Island Lighthouse until the Federal agencies complied with Sections 106 and 110 of the National Historic Preservation Act (NHPA) and Section 4(f) of the Department of Transportation Act. As part of the project to solarize the lighthouse, which is listed in the National Register of Historic Places, the Coast Guard conducted a site survey, approved removal of the structure's third-order Fresnel lens, and began installing solar panels without notifying the Advisory Council on Historic Preservation or the Wisconsin State Historic Preservation Officer (SHPO). After a private citizen informed the SHPO of these activities, the SHPO notified the Coast Guard that it must comply with Section 106 and requested it to cease work.

The Coast Guard sent the SHPO a finding of no adverse effect. The SHPO disagreed with the determination and informed the Coast Guard that it should initiate consultation to resolve the project's adverse effects. The Council also notified the Coast Guard that it should suspend activities until it could demonstrate compliance with NHPA. Once again, the Coast Guard wrote the SHPO, describing the changes to the lighthouse‹by this time complete‹and restating its finding of no adverse effect. The SHPO again disagreed with the finding, noting that the information provided by the Coast Guard failed to meet the documentation requirements set forth in the Council's regulations.

In deciding whether the Coast Guard had complied with Section 106 of NHPA, the court explained that the Council's regulations require a Federal agency to notify the SHPO of a finding of effect before making a no adverse effect or adverse effect determination. Because the Coast Guard failed to advise the SHPO on the effect finding, the court determined that it had not complied with Section 106. Slip op. at 10-11. The Coast Guard countered that it was complying with the requirements of Section 110 when it removed the Fresnel lens so that the lighthouse could be better used. The court recognized that the Coast Guard may have followed the requirements of Section 110 in attempting to use the historic lighthouse to the maximum extent possible but stated that in planning for such use the Coast Guard was still required to adhere to Section 106 procedures. Additionally, the court found that the Coast Guard failed to comply with NHPA when it approved the lens removal prior to notifying the Council and the SHPO and giving the Council an opportunity to comment.

The court also ruled in favor of plaintiffs on the Section 4(f) claim, finding that the removal of the lens was a "use" as defined in the Department of Transportation Act of 1966 because it diminished the historical value of the lighthouse site. *Id.* at 13. The court awarded attorneys' fees and costs to plaintiffs and enjoined defendants from proceeding with the project until they complied with the Council's regulations.

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Case 80

Fill the Pool Committee v. Village of Johnson City, No. 82-CV-762 (HGM) (N.D.N.Y. Aug. 19, 1982, June 23, 1983).

Plaintiffs sought to enjoin the village of Johnson City, New York, from demolishing the C. Fred Johnson pool. The pool and its surrounding park, originally built and maintained by a local company, were bought by the village in 1968 in part with money provided by the National Park Service (NPS) under its Land and Water Conservation Fund. The grant contract provided that the village must obtain NPS consent before making any changes in the use or ownership of the pool or its surrounding park. The pool was closed in 1972, and its condition had deteriorated. When the village decided to demolish it, plaintiffs requested that NPS determine whether the pool was eligible for the National Register of Historic Places; village officials were aware of this request.

During the next month, the village closed the entire park, thus triggering the grant contract requirement that NPS approval for changes in the use of the park be obtained. Soon after, the State determined that the pool appeared to meet the National Register criteria for eligibility. Nevertheless, the village began demolition of the pool. Two days after the court had granted a temporary restraining order, NPS concurred with the State's determination of the pool's eligibility for inclusion in the Register.

In addressing plaintiffs' motion for preliminary injunction, the court first found that the imminent demolition was a sufficient showing of irreparable harm. Aug. slip op. at 6.

Second, the court determined that plaintiffs were likely to succeed on the merits of their claims that Section 106 of the National Historic Preservation Act (NHPA) applied. The court found that the grant contract provision requiring NPS approval for changes in the use of the park constituted continuing Federal involvement that could be considered an "undertaking" under the definition established by the Advisory Council on Historic Preservation in its regulations implementing Section 106 of NHPA at 36 C.F.R. § 800.2(c). Demolition of the pool was one such change requiring NPS approval. *Id.* at 7-9. The court held that the village of Johnson City violated Section 106 of NHPA and preliminarily enjoined the demolition. *Id.* at 9.

The parties returned to court on motions to dissolve the preliminary injunction and for attorneys' fees under Section 305 of NHPA. Because the village had by that time complied with Section 106, the court lifted the injunction. June slip op. at 2. In addition, the court found that plaintiffs had substantially prevailed within the meaning of Section 305. The court examined the hours claimed by plaintiffs' attorney, found them and the claimed hourly rate to be reasonable, and granted plaintiffs' motion for fees and costs. *Id.* at 5.

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Case 147

***Friends of the Astor, Inc. v. City of Reading*, 1998 WL 684374 (E.D. Pa., Sep. 17, 1998); No. Civ. A. 98-CV-4429.**

Plaintiff, Friends of the Astor, Inc., filed a complaint against defendant, the City of Reading, alleging that the attempted demolition of a historic theater, the Astor, violated the National Environmental Protection Act, National Historic Preservation Act (NHPA), and Community Development Grant Act of 1974. In this decision, the court denied plaintiff's motion for a preliminary injunction on the demolition, due to its finding that plaintiff had not demonstrated a likelihood of success on the merits.

The city was attempting to demolish the 1928 Astor Theater in order to build a new convention center. The theater was placed on the National Register of Historic Places in 1978. It has, however, stood unused since the late 1970s, and although structurally sound, was in substandard condition.

In 1994, the city received funding from the State of Pennsylvania to match the Community Development Block Grant funds that the U.S. Department of Housing and Urban Development had agreed to provide for the rejuvenation of Reading's downtown business area. This rejuvenation included the construction of a convention center (the "Project") on the block where the Astor was located, which would result in the Astor's demolition.

In April 1998, after more than a year of negotiations, a Memorandum of Agreement (MOA) was executed between the city, the Advisory Council on Historic Preservation, and the Pennsylvania State Historic Preservation Officer (PASHPO) in order to satisfy Section 106 of NHPA. Stipulation II of the MOA stated that "The city shall not issue a demolition permit for the properties until confirmations of the financing commitments of the Project are received, with copies being forwarded to the PASHPO."

Friends of the Astor argued that the city failed to comply with the requirements of NHPA by violating this stipulation of the MOA. Plaintiff stated that although a financing commitment had been received, it was subject to a number of conditions. Plaintiff then argued that the intention of the parties was to create a meaningful condition to the demolition, and that a commitment subject to conditions was meaningless. The court refused to consider the intent argument, stating that "the city's obligations cannot be read to extend any further than what is expressly stated in the MOA." Since the stipulation at issue only required financing commitments, without qualifications, a conditional commitment was enough to comply with the stipulation.

After reviewing plaintiff's arguments on the other alleged violations, the court concluded that there was no likelihood of success on the merits and denied the preliminary injunction. Among other things, the court stated that the fact that a property is listed in the National Register does not alone require the preparation of an Environmental Impact Statement under NEPA, when the property's demolition is proposed.

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Case 144

***Friends of the Atglen-Susquehanna Trail, Inc. v. Pennsylvania Public Utility Comm'n*, 717 A.2d 581 (Pa. 1998).**

Plaintiff, Friends of the Atglen-Susquehanna Trail, Inc. (FAST), a rails-to-trails organization, requested judicial review of a decision by defendant, the Pennsylvania Public Utility Commission, that approved stipulations of a settlement that Conrail, a railroad company, entered into with local townships and the Department of Transportation (DOT) that abolished rail-highway crossings along the former Enola Branch rail line and allowed the transfer of Conrail's property.

Plaintiff questioned whether the commission was preempted from ordering the demolition of historic bridges by the Interstate Commerce Commission's (ICC) and the Surface Transportation Board's (STB) orders; whether the commission had complied with the State History Code; whether the commission had erred by not including this case in a moratorium adopted pursuant to the governor's policy of bridge preservation; whether the commission complied with the Rails to Trails Act of December 18, 1990; and whether the commission's conclusion that certain bridges are near the end of their useful life is supported by substantial evidence. The commission challenged FAST's standing to appeal.

The court dismissed the commission's request to quash the petition for review based on FAST's lack of standing to appeal. In support of its position, the commission had asserted that FAST did not have an immediate or substantial interest, did not own the subject land or have a reasonable expectation of owning the land. The court found that FAST had standing under State preservation laws because it sought to enforce State and Federal laws and policies relating to historic preservation. Additionally, as a trails group, it had exerted substantial efforts to acquire and convert the rail line at issue.

The petitioners attempted to assert that the subject matter jurisdiction of the commission was preempted by orders of ICC and STB, and that the theory of "conflict preemption" which can apply where State law actually conflicts with Federal law to such a degree that it is impossible for a private party to comply with both, "or where State law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Friends*, 717 A.2d 581, 586. In this instance, FAST proposed that conflict preemption applied to divest the commission of jurisdiction until the Section 106 review process required by the National Historic Preservation Act (NHPA) was completed. The court held that the commission was not preempted from proceeding in the matter, and that its order was not in conflict with STB requirements because it required the applicant to complete Section 106 review in compliance with the order.

FAST's argument—that the commission erred by not including the case in the moratorium issued by the commission pursuant to the governor's policy of bridge preservation adopted shortly after the order in this case—was dismissed with a finding that the issue had not been properly presented and amounted to nothing more than a disagreement with a policy decision.

The court concluded its review by rejecting FAST's assertion that the commission's conclusion regarding the condition of the subject bridges, and the finding that they were near the end of their life span, was not supported by substantial evidence. On the other hand, after noting more than 350 factual findings made by the administrative law judge and reports by both the applicant and affected townships, the court found that there was substantial evidence to support the finding of fact, and affirmed the order of the commission.

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Case 104

Friends of Sierra Railroad v. Interstate Commerce Commission, 881 F.2d 663 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park &;Recreation District v. Interstate Commerce Commission*, 493 U.S. 1093 (1990).

Pursuant to the Staggers Act, the Sierra Railroad obtained an exemption from the Interstate Commerce Commission (ICC) that permitted it to abandon a one-mile segment of its rail line without going through the regular procedures. Prior to granting the exemption, ICC published a notice in the *Federal Register*, alerting the public of filing deadlines for petitions to stay or to reconsider the exemption. ICC also sent notices to numerous State agencies, including the California State Historic Preservation Officer (SHPO). No objections were filed within the prescribed deadlines.

Over one year after the notice of exemption was published, Friends of Sierra Railroad, a group interested in preserving the line for public use, became aware of the abandonment and contacted the Advisory Council on Historic Preservation. The Council informed ICC that the abandoned segment of the line was eligible for the National Register of Historic Places and, therefore, that ICC had violated Section 106 of the National Historic Preservation Act (NHPA) when it exempted the railroad abandonment without undergoing the Section 106 process. The railroad preservation group subsequently filed a motion to reopen the proceedings and a petition for reconsideration, both of which ICC denied. The group then petitioned for review of the ICC action in the Ninth Circuit.

In deciding whether it had jurisdiction to hear the challenges to the abandonment, the court of appeals first determined that it did not have jurisdiction to review the original ICC order that granted the exemption and allowed the abandonment because the group had not petitioned for review of the final order within the 60-day time limit. 881 F.2d at 666. Even though it had filed a petition to reopen the proceedings, the court explained, an unsuccessful petition to reopen could not create a new final order that gives the court jurisdiction over an untimely petition for review. Next, the court determined whether it could review ICC's denial of the petition to reopen the proceedings and the petition for reconsideration. In setting forth the standard for reviewing such refusals, the court stated that even if the ICC order were erroneous, review was appropriate only if the petition was based on new evidence or changed circumstances. *Id.* (citing *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284 (1987)).

Petitioners argued that new evidence existed because ICC's notice of exemption failed to disclose that the railroad line was eligible for the National Register and that the State of California could purchase the line. The court rejected this argument, stating that that information was available when the *Federal Register* notice was published and, therefore, was not new evidence but merely newly raised evidence. *Id.* at 667. Moreover, the court determined that publication of the notice of exemption constituted sufficient notice to the public of the abandonment proceeding.

The court also rejected petitioners' claim that new evidence and changed circumstances existed as a result of a subsequent D.C. Circuit decision which invalidated ICC's exempt abandonment procedures. The court of appeals reasoned that petitioners could have challenged the validity of those proceedings when the notice of exemption was published. The court found that the proceedings could not be reopened or reconsidered even if the decision involved material error. Finding it lacked jurisdiction to hear the matter, the court of appeals dismissed the case.

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Case 119

Gettysburg Battlefield Preservation Association v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993).

A preservation organization and several individuals sued the Department of Interior, the Gettysburg Railroad, and Gettysburg College in Pennsylvania as the result of a land exchange agreement between the National Park Service (NPS) and the college involving the Gettysburg National Military Park. Plaintiffs alleged that defendants failed to conduct an environmental impact study as required by the National Environmental Policy Act (NEPA) and failed to comply with the National Historic Preservation Act (NHPA) prior to exchanging the land. Plaintiffs sought a declaratory ruling and mandamus order requiring the Interior Department to perform the EIS and conduct a Section 106 review, in addition to an injunction against private defendants to "undo" the land exchange and return the land to its original condition.

Prior to the land exchange, NPS conducted an environmental assessment as part of a boundary study for the park. The study recommended the deletion from park boundaries of a 7.5 acre tract of land that lay between the park and Gettysburg College to facilitate the rerouting of the Gettysburg Railroad. The report found that the boundary change would have no adverse impact on known historic resources and a finding of no significant impact was made. After the land exchange, the college granted the railroad an easement to relocate its rail line over the 7.5 acres, and construction of the tracks was completed.

Plaintiffs' NEPA claim was based on defendants' failure to perform an environmental impact statement (EIS) prior to the land exchange, which plaintiffs argued constituted a major Federal action. Defendants countered that even if plaintiffs' allegations were true, the court lacked jurisdiction to hear the case, because there was no longer Federal involvement in the project; therefore, the case was moot and plaintiffs lacked standing. 799 F. Supp. at 1576. Generally, defendants argued that plaintiffs could no longer obtain redress from the court because the Federal Government was no longer involved in the 7.5-acre parcel, and private parties had complete control over the land. As support for their proposition, defendants relied on *Environmental Rights Coalition, Inc. v. Austin,* 780 F. Supp. 584 (S.D. Ind. 1991), which addressed similar circumstances.

The district court adopted the opinion of the *Austin* court: "Without the requisite involvement in a project by a federal agency the project simply does not involve 'major federal action' [necessary to trigger NEPA requirements] no matter how much the project may impact the environment." 799 F. Supp. at 1577 (quoting *Austin,* 780 F. Supp. at 594). The court acknowledged that non-Federal parties fell under the purview of NEPA when the Federal Government was sufficiently involved in the project. *Id.* For example, a private project is viewed as Federal for purposes of NEPA if the private entity consents to Federal regulation, accepts Federal funding, grants the Federal agency control over the outcome of the project or agrees to a joint venture with a Federal agency. *Id.* (citing *Austin,* 780 F. Supp. at 594-96).

The district court agreed with a test developed by the court in *Austin* to determine if there was enough Federal agency control over a project to reach non-Federal entities under NEPA: The court should consider if the project at any time involved a major Federal action and, if so, whether the agency continued to be involved in the project in such a way that the project could be terminated or significantly impacted. *Id.* Applying this test, the district court found no ongoing Federal control over the project.

Plaintiffs, however, alleged that the court had authority over the case because defendants acted in bad faith by intentionally disregarding NEPA, withholding information, and misleading the public. The court rejected plaintiffs' argument, concluding that bad faith should not be part of the inquiry into whether Federal involvement exists. *Id.* at 1578. In explaining its determination, the court stated that such an inquiry would open a floodgate of litigation; parties would make conclusory allegations and search in hindsight for support for the allegation. *Id.* at 1580. The court distinguished several cases cited by plaintiffs which suggest that bad faith may be considered in deciding whether the

court has authority to apply NEPA to completed projects. Those cases, the district court noted, did not involve private projects with no ongoing Federal control. *Id.* at 1578-80.

Addressing the NHPA claim, the district court observed that like NEPA, NHPA was a procedural statute and that "the invocation of NHPA involve[d] a similar search for federal involvement as NEPA . . . ." *Id.* at 1580. The court found support for its position in several NHPA cases. The court cited *Morris County Trust for Historic Preservation v. Pierce,* 714 F.2d 271 (3d Cir. 1983), which concluded that NHPA applied as long as the Department of Housing and Urban Development retained the authority to make funding approvals or demand changes to the project. 799 F. Supp. at 1581. Similarly, the court cited *Vieux Carré Property Owners, Residents &;Associates, Inc. v. Brown,* 948 F.2d 1436 (5th Cir. 1991), which held that "'NHPA review is required as long as a federal agency has the ability, under any statute or regulation, to require changes to the federal license authorizing a project.'" 799 F. Supp. at 1581 (quoting *Vieux Carré,* 948 F.2d at 1449). Without Federal involvement or control in the project, the court found that it had no jurisdiction to order a Federal agency to comply with NHPA or to enjoin the project.

The court also rejected several State claims against the Federal defendants, finding them barred by the doctrine of sovereign immunity. As a final matter, the court dismissed plaintiffs' allegations that defendants violated the Federal Tort Claims Act, determining that plaintiffs failed to exhaust administrative remedies before bringing the claim.

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Case 73

Goodman Group, Inc. v. Dishroom, 679 F.2d 182 (9th Cir. 1982).

A corporation representing a group of local artists brought suit to enjoin the Department of Housing and Urban Development (HUD) from rehabilitating the Goodman Building, a property listed in the National Register of Historic Places and occupied by the artists. HUD and a local redevelopment agency proposed to convert the building to low income housing units under a loan and grant agreement.

HUD had complied with the National Historic Preservation Act (NHPA) and had prepared a special environmental clearance in which it concluded that no environmental impact statement (EIS) was necessary under the National Environmental Policy Act (NEPA). Plaintiff claimed that HUD's actions would displace the local artists and thus irreparably damage the cultural character of the area, thereby necessitating an EIS.

The court disagreed, holding that when effects on the physical environment are evident, it is appropriate for the agency to consider cultural factors in its environmental review. However, a cultural threat, standing by itself, does not require preparation of an EIS. 679 F.2d at 185.

Second, the court noted that HUD worked in concert with local officials, acted consistently with local land use policies, and complied with NHPA. The court found these factors to support the validity of HUD's compliance with NEPA. *Id.* at 186.

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Case 145

***Grand Canyon Air Tour Coalition v. Federal Aviation Administration,* 154 F.3d 455 (D.C. Cir. 1998).**

Plaintiff, the Hualapai Tribe, maintained that defendant, the Federal Aviation Administration (FAA), issued too soon Special Flight Rules regarding the reduction of aircraft noise from sightseeing tours in the vicinity of Grand Canyon National Park. The tribe asserted that when FAA was developing these rules, it failed to consider whether establishing expanded flight-free zones would push aircraft noise off the park and onto the Hualapai Reservation.

The tribe argued that the consequences of this decision would harm the tribe's traditional cultural properties, sacred sites, ongoing religious and cultural practices, natural resources, and economic development. It further alleged that FAA's failure to consider these possible consequences violated the National Historic Preservation Act, National Environmental Policy Act, Administrative Procedure Act, and the United States' trust obligations to the tribe.

The court held that the tribe's arguments were not ripe because the routes the air tours would take had not been determined, and the court could not assess whether or how much these routes would affect the reservation.

The tribe also contended that the Government had failed to consult with it on a government-to-government basis while developing the Final Rule, but reformulated this position in oral argument, conceding that there had been consultations but they were not meaningful. The court also postponed its review of this assertion, finding that FAA still had time to satisfy any consultative obligations before the final plan was implemented, and these claims would become ripe for the court's consideration.

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Case 36

Hall County Historical Society v. Georgia Department of Transportation, 447 F. Supp. 741 (N.D. Ga. 1978).

Plaintiff, a historical society, sought to enjoin the construction of a proposed highway to be built with Federal aid in the vicinity of, but not within, the Green Street Historic District, listed in the National Register of Historic Places, alleging that the Federal Highway Administration (FHWA) had violated Section 4(f) of the Department of Transportation Act, the National Historic Preservation Act (NHPA), and other laws. The State was also a defendant, and an intervenor had joined the litigation, asserting an ancillary claim of breach of agreement against the State. The State had taken a piece of property within the historic district in exchange for a promise to the intervenor to provide an access lane during construction. Plaintiff specifically challenged FHWA's delegation of historic preservation responsibilities to the State, which had been effected by a memorandum of understanding between FHWA and the State. Defendants moved to dismiss, alleging lack of standing, lack of subject matter jurisdiction, and laches.

The court found, first, that plaintiff had standing to challenge FHWA's compliance with the various Federal statutes involved but not to challenge the memorandum of understanding between FHWA and the State. Standing was based on the fact that several of plaintiff's members resided in or owned property within the historic district and allegedly could suffer esthetic and environmental harm to their property. 447 F. Supp. at 747.

Second, the court held that it had subject matter jurisdiction because there was a substantial probability that the value of the rights to be protected‹aesthetic and environmental‹exceeded the jurisdictional amount required by 28 U.S.C. § 1331(a). The court also assumed ancillary jurisdiction of the intervenor's claims. *Id.* at 748.

Third, the court held that laches did not bar the suit because plaintiff had been diligent in communicating its objections to the State and FHWA from the time it first became aware of the highway plan in 1975 until the time the suit was finally filed in 1977. *Id.* at 748-49.

Fourth, the court rejected plaintiff's claim that the State agency's agreement with the intervenor regarding the lot and the access lane amounted to a use of historic land that would trigger the requirements of Section 4(f). Because defendants acted in good faith to avoid any physical use of land in the historic district, plaintiff failed to carry its burden of showing physical use. The court rejected plaintiff's claim that the secondary effects of the project on the district constituted "constructive use" of the district land. To show "constructive use," plaintiff must present evidence of a direct and significant impact. Moreover, Congress did not intend to protect commercial property from potential economic decline when it enacted Section 4(f). The court found that the intervenor was not entitled to specific performance of the agreement because of the strong public policy vesting full control of State highways in the State. *Id.* at 749-50. The court denied the requests for injunctive relief under Section 4(f). *Id.* at 750.

The court did hold, however, that FHWA had improperly delegated its NHPA responsibilities to the State. Although State officials may participate in the historic review process, NHPA requires that studies, reports, and evaluations and determinations of effect, adverse effect, or no effect be the independent actions and decisions of the Federal agency and not simply rubber-stamps of the State's work. *Id.* at 751-52.

The court enjoined the State from constructing the part of the project that would affect the historic district until FHWA had complied with NHPA or until the State had reimbursed the Federal Government for all funds for project construction that had been advanced and had refused all further funds. *Id.* at 752.

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Case 30

Hart v. Denver Urban Renewal Authority, 551 F.2d 1178 (10th Cir. 1977).

Plaintiffs sued to enjoin the sale of the Daniels and Fisher Tower in Denver, Colorado, which had been listed in the National Register of Historic Places in 1969. The sale was proposed by a local redevelopment agency as part of an urban renewal project funded in part by a loan and capital grant from the Department of Housing and Urban Development (HUD), awarded in 1968. HUD had complied with neither the National Historic Preservation Act (NHPA) nor the National Environmental Policy Act (NEPA). The district court issued an injunction on the ground that HUD failed to comply with its own regulations implementing NHPA, but held that neither NHPA nor NEPA applied.

The Tenth Circuit affirmed the district court's decision that NHPA did not apply. 551 F.2d at 1179. Section 106 of NHPA requires agencies to seek the comments of the Advisory Council on Historic Preservation "prior to the approval of the expenditure of any Federal funds." Because the "approval" was the execution of the loan and capital grant contract in 1968, prior to the date that the tower was placed on the Register, HUD did not have to seek the Council's comments. The court rejected plaintiffs' arguments that the operative date was 1971 or 1972, when major amendments were made to the project, or 1970, when the local agency purchased the tower. In neither instance was HUD approval of expenditures of funds involved. *Id.* at 1180.

Second, the court held that the application of NEPA to an ongoing project must be considered in relation to the particular matter or structure being evaluated. Because the historic structure involved was only one building in a very large project and had been treated separately throughout the process, its historic value was balanced against the burden to defendants of stopping the project to comply with NEPA. The court found that the balance lay against enjoining the project to require compliance with NEPA. *Id.* at 1181-82.

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Case 98

Historic Preservation Guild of Bay View v. Burnley, 896 F.2d 985 (6th Cir. 1989).

The State of Michigan proposed to widen a portion of a highway from two to three lanes, bringing the road closer to several cottages located in the Bay View National Historic Landmark District. The segment of the highway at issue was part of a 2.8-mile stretch the State had divided into 6 segments. Three of the segments were federally funded. Plaintiffs sued the Michigan Department of Transportation (Michigan DOT) and the Federal Highway Administration (FWHA) seeking an injunction against the road project and further study by the Federal Government of the project's environmental effects.

The district court denied plaintiffs' motion for a temporary restraining order and a preliminary injunction, and granted defendants' motion for summary judgment on the grounds that the project was not federally funded. In addition, the court denied a request for a stay or injunction pending appeal. Plaintiffs' request for an injunction was also denied by the court of appeals, and road construction began. The appellate court granted a subsequent motion to enjoin further construction until it heard the merits of the case, but, once again, reversed its position and dissolved the stay. By the time of the appeal, substantial highway construction had occurred.

Plaintiffs' primary argument was that defendants had segmented the project to avoid compliance with Federal environmental laws. The director of the National Park Service supported this position. The defendants argued in response that no Federal funds would be used on the contested segment. Indeed, FHWA had already advised the State that it would not fund the segment affecting the historic district, because it did not meet Federal capacity requirements. Funding was not denied as a consequence of environmental or historic preservation concerns. Additionally, defendants contended, each segment had a logical terminus with independent utility. 896 F.2d at 989-90.

The court of appeals observed that the "absence of federal funding may not excuse non-compliance with federal laws if this highway project at issue is found to be segments of an overall federal construction project." *Id.* at 990 (citing *Hawthorn Environmental Preservation Association v. Coleman*, 417 F. Supp. 1091, 1099 (N.D. Ga. 1976), *aff'd*, 551 F.2d 1055 (5th Cir. 1977). The court of appeals examined several highway construction cases and determined that the issue turned on whether the segment was dependent on construction of the other segments of the highway, or whether the segment could be independently justified. 896 F.2d at 990-91.

The case law discusses numerous factors that may be considered in determining whether a group of segments should be classified as a single project, such as the location of the segments, the use of the segments, the relationship of the disputed segment to other parts of the road, and the planning of the road. *Id.* In addition to the case law, the court noted the definition of logical project segments in the transportation regulations. *See* 23 C.F.R. § 771.111(f). 896 F.2d at 992.

Based on the case law, the court of appeals found that the construction of the segment through Bay View was not subject to compliance with Federal laws, even though other segments of the road were federally funded.

Although the court of appeals found "no error" in the district court's denial of a preliminary injunction, *id.* at 993, the court of appeals expressed "reservations" about the lower court's summary judgment ruling, calling it "a very close question." *Id.* at 995. The court of appeals believed "there was a serious question about [the] existence of [a] genuine issue of material fact as to whether the project segment in question at Bay View was entirely a state project in light of prevailing authority," *id.* at 993, and found that plaintiffs "should have been afforded an opportunity" to offer evidence on that factual issue. *Id.* at 993, 995. However, the court concluded that any error was harmless because the road project had been completed. *Id.* at 995.

Although the court denied relief to plaintiffs, the court did offer a couple of prospective future remedies. The court warned that its ruling was based on the "understanding that no further widening of the questioned Bay View segment

will take place without meeting federal environmental standards as they relate to a National Historic Landmark." *Id.*

The court also suggested that plaintiffs would have the future right to "seek redress or modification of the highway project . . . if serious adverse impact may be demonstrated on the Bay View Landmark by reason of construction and/or maintenance of this project." *Id.*

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Case 37

Historic Preservation of Shreveport v. Department of Health, Education, and Welfare, No. 78-0905 (W.D. La. Sept. 11, 1978).

The General Services Administration (GSA) proposed to sell as surplus property the Old Federal Building in Shreveport, Louisiana, a building listed in the National Register of Historic Places. The government of the parish in which the building was located submitted to GSA an application to purchase the building, outlining the parish's plans for remodeling each part of the building. Because of the historic nature of the building, the parish proposed to retain in their original condition one entrance and a portion of the old lobby.

Because the building was to be used for educational purposes, GSA assigned the building to the Department of Health, Education, and Welfare (HEW) for transfer to the parish. HEW then determined that the transfer was not a major Federal action significantly affecting the environment and decided not to prepare an environmental impact statement under the National Environmental Policy Act (NEPA).

This decision was based in part on a covenant that was to be placed in the deed which would bind the parish to preserve the architectural and structural integrity of the building and to accomplish any restoration or action affecting the exterior of the building in a historically authentic manner.

HEW and GSA, with the concurrence of the State Historic Preservation Officer (SHPO), also determined that the transfer would have no adverse effect on the building. The Advisory Council on Historic Preservation accepted the determination of no adverse effect under its regulations implementing Section 106 of the National Historic Preservation Act (NHPA).

The parish then transferred partial title to the city but omitted the covenant from the deed. This deed obligated the city and the parish to carry out the plans contained in the parish's application and to obtain the consent of HEW before deviating from the plans.

As the remodeling plans developed, the parish concluded that it would be necessary to deviate from the plans contained in the application. The major change was to the lobby, which had been named in an addendum to the National Register listing as a significant architectural feature of the building. After HEW requested the Council's comments, the parties entered into a Memorandum of Agreement (MOA) under the Council's regulations that did not mention the lobby. The parties to the MOA, however, had considered the effect of the amended plans on the entire building, including the lobby.

The court granted plaintiffs' motion for a temporary restraining order. In considering the merits of the case, the court first dismissed the suit with respect to the non-Federal defendants for lack of jurisdiction, finding that the injury that plaintiffs sought to avoid could not be valued at more that $10,000 as required by 28 U.S.C. § 1331(a). Slip op. at 10. [Ed. note: The $10,000 amount in controversy has since been abolished.]

Next, the court held that plaintiffs had standing under the Administrative Procedure Act to seek review of the Federal agency's action. *Id.* The standard by which the agency was to be judged was the Council's regulations. *Id.* at 11.

Plaintiffs asserted that HEW had violated NHPA and the Council's regulations by failing to take into account the effects of the amended plans on the lobby; failing to seek a formal determination of the eligibility of the lobby for the Register from the Secretary of the Interior; failing to submit a preliminary case report and other documents to the Council; failing to consult with the SHPO; and engaging in the consultation process in bad faith by holding the consultation meetings in the District Attorney's office and failing to include the press and public in the consultation meetings, take minutes, and invite certain people to the meetings. They further asserted that the MOA was void because it was drafted before the parties had reached unanimous agreement. Finally, they claimed that a consultation

meeting should have been open to the public under the Federal Advisory Committee Act (FACA).

The court rejected each of these claims. First, how HEW took the plans into account must be judged by determining whether it complied with the Council's procedures. NHPA does not require that all historic structures be preserved. *Id.* at 12.

Second, the Secretary of the Interior need be consulted only to determine the eligibility of a property for the Register. In this case, the building was already listed at the time of the agency action. The Secretary has no say in determining the legal effect of listing an object. *Id.* at 13.

Third, the court found that HEW's "marginal impact statement" was the substantial equivalent to a preliminary case report and was accepted as such by the Council. The name that the document bears is less important than whether its contents adequately apprise its recipients of the circumstances of the undertaking. *Id.*

Fourth, the court found that HEW's procedure of forwarding its decisions to the State Historic Preservation Officer for concurrence or objection was a reasonable means of consultation. *Id.* at 14.

Fifth, the court rejected plaintiffs' claim that the consultation process had been carried out in bad faith, finding that none of the things for which plaintiffs faulted HEW were required by the Council's regulations. *Id.*

Sixth, the court held that it was acceptable to draft the MOA based on the tentative conclusions reached at one of the consultation meetings, even though all parties had not agreed fully. *Id.* at 15.

Finally, the court rejected plaintiffs' FACA argument because NHPA expressly exempts the Council from the provisions of that act. *Id.* at 17.

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Case 56

Hoe v. Alexander, 483 F. Supp. 746 (D. Haw. 1980).

Hawaiian fishermen sought to enjoin the Army Corps of Engineers from dredging sand from an offshore sandbar to provide fill for an eroding beach in a park within the Ahupua'a of Kualoa, an area listed in the National Register of Historic Places. The Corps determined that the dredging would have no adverse effect on the historic area. The Advisory Council on Historic Preservation had concurred in this determination under the Council's regulations implementing Section 106 of the National Historic Preservation Act. Plaintiffs nevertheless alleged that the Corps had violated Section 106, the Council's regulations, and Executive Order No. 11593.

The court denied plaintiffs' motions for summary judgment and permanent injunction, finding that the Corps had complied with the historic preservation laws in making its determination of no adverse effect and in keeping in constant touch with the State Historic Preservation Officer. Moreover, the sandbar lay outside the boundaries of the Ahupua'a. 483 F. Supp. at 749-50.

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Case 151

Hoonah Indian Association v. Morrison, 170 F.3d 1223 (9th Cir. 1998).

Plaintiffs, Hoonah Indian Association et al., sought an injunction against two timber sales in the Tongass National Forest of Alaska. Both plaintiffs filed a claim under the Alaska National Interest Lands Conservation Act, which is beyond the scope of this report. However, the Sitka Tribe also filed a National Historic Preservation Act claim as to the Northwest Baranof sale. The Sitka argued that defendant, the U.S. Forest Service, improperly handled the designation and protection of the Kiks.adi Survival March path.

However, the appellate court agreed with the district court's findings, stating that the Forest Service applied the National Register standards to this particular area following a comprehensive search for possible historic properties during the preparation of its Environmental Impact Statement (EIS). Out of the 45 properties identified, 39 were found eligible for inclusion on the National Register. The Kiks.adi Survival March path was not one of these 39 sites. The Forest Service, along with the State Historic Preservation Officer (SHPO), approved this list.

The Sitka Tribe agreed that the 39 sites would not be affected by the timber sale. The SHPO determined that the Kiks.adi Survival March path was not eligible. The tribe did not appeal the SHPO's decision. The court believed that the tribe could have appealed that decision under 36 C.F.R. Section 60.12, and that failure to do so made the decision unchallengeable for failure to exhaust administrative remedies.

However, the tribe did appeal the EIS on the ground that the Forest Service did not recommend listing the Kiks.adi Survival March trail. The courts' review of this was limited to whether this decision was arbitrary or capricious. Although the tribe argued that the Forest Service never applied the National Register criteria to the Survival March routes, the court found that the record showed that it did. The trail did not fit into the definition because, after extensive research by the Forest Service, no evidence could be found to point to any one particular place as the National Register criteria require. The criteria require an "actual location." The court found the "actual location" of the Kiks.adi route to be unknown, and the tribe's own submission called it a "symbolic" location as opposed to an "actual" one.

In affirming the denial of the injunction, the court stated that the fact that important things happen in a general area is not enough to make the area a "site." For it to qualify for Federal designation as a historical site, there has to be some good evidence of just where the site is and what its boundaries are. The Keeper of the National Register agreed in her report on this issue.

In conclusion, the court stated that the district judge correctly determined that because the tribe could not prevail on the merits, and the Forest Service determinations were not arbitrary or capricious, the tribe's request for an injunction against the timber sales should be denied.

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Case 74

***Hough v. Marsh*, 557 F. Supp. 74 (D. Mass. 1982).**

Plaintiffs challenged the issuance of an Army Corps of Engineers permit allowing two individuals to deposit fill in wetlands in Edgartown Harbor on Martha's Vineyard as part of the construction of two residences and a tennis court for private use. The property was adjacent to the historic Edgartown lighthouse. Although the Corps, after its decision to issue the permit had been made, called the State Historic Commission and the Advisory Council on Historic Preservation to ascertain whether the lighthouse had been nominated for inclusion in the National Register of Historic Places, it had not complied with the National Historic Preservation Act (NHPA) or the Council's regulations implementing Section 106 of NHPA.

The Corps argued that NHPA was inapplicable because the lighthouse had not been determined to be eligible for the Register and the Corps had considered the impact of the project on the view of the lighthouse. The court dismissed these arguments, finding that although the Council's regulations impose on the Corps only a procedural and not a substantive obligation, the requirements of NHPA are important, and the Corps' brief consideration of the view of the lighthouse was insufficient to fulfill its NHPA duties. 557 F. Supp. at 87.

Furthermore, the court found it immaterial that the lighthouse had not been officially determined to be eligible for inclusion in the National Register. The Council's regulations define "eligible property" as any property that meets the National Register criteria, not any structure that has been formally determined eligible. In addition, agencies have affirmative responsibilities to locate and identify any eligible properties within the area of an undertaking's impact. *Id.* at 88.

The court remanded the issue to the Corps. *Id.*

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Case 99

Illinois Commerce Commission v. Interstate Commerce Commission, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

The Rails to Trails Conservancy, two other nonprofit organizations, and several industry groups challenged the Interstate Commerce Commission's (ICC) promulgation of regulations to allow an expedited procedure for abandonment of out-of-service rail lines. The court of appeals had found in an earlier decision that ICC did not adhere to the requirements of the Administrative Procedure Act (APA) when it established a class exemption for such rail lines. According to the court of appeals, ICC's record did not support its determinations with regard to established abandonment procedures, and the case was remanded to ICC. In this decision, the court of appeals reviewed ICC's rulemaking on remand and addressed new allegations raised by the nonprofit petitioners.

The nonprofit petitioners argued first that the rulemaking proceeding itself constituted a major Federal action requiring compliance with the National Environmental Policy Act (NEPA). They alleged further that the exemption requirements failed to ensure compliance with the National Historic Preservation Act (NHPA) and NEPA. Finally, they argued that ICC did not adequately consider the effect of the regulations on public use of the abandoned lines under both the National Trails System Act and the Interstate Commerce Act.

The appellate court reviewed the analysis of ICC and determined that the regulations were neither arbitrary nor capricious. 848 F.2d at 1250. The court found that on remand ICC fulfilled the requirements of APA by providing a logical and persuasive explanation of how the regulations achieved rail transportation policy goals and statutory requirements in the Staggers Rail Act of 1980. *Id.* at 1250-56.

Upon determining that ICC abided by APA's requirements, the court then addressed the environmental issues raised by the Rails to Trails Conservancy and other nonprofit petitioners. In response to the allegation that ICC failed to consider the environmental consequences of the rulemaking, ICC argued that the proceeding did not have an environmental impact, noting that it would reduce regulatory burdens on abandonments, not change their number. *Id.* at 1257. The court rejected that reasoning, concluding that "the procedural nature of a regulation does not, therefore, exempt an agency from complying with NEPA and preparing an environmental assessment (EA) or an environmental impact statement (EIS) where appropriate." *Id.*

Nonetheless, although ICC did not prepare an EA or EIS, the court found that the environmental impacts of the rulemaking were considered. Specifically, ICC noted in the proceeding that its exemption authority did not extend to exempting actions from environmental laws. Indeed, its regulations required applicants for exemptions to submit information on environmental issues. *Id.* ICC additionally developed procedures to comply with NEPA and other environmental statutes when individual abandonment exemptions were issued. Based on the above consideration of environmental impacts, the court declined to remand the case to ICC even though ICC failed to develop an EA, as required by its own regulations and those of the Council on Environmental Quality (CEQ).

Nonprofit petitioners also challenged the procedures established by ICC regulations to comply with NEPA and NHPA. They stated that ICC's regulation was improper because it placed the duty to raise environmental concerns on the applicants, allowed ICC to authorize abandonment without considering environmental impacts, failed to provide adequate standards for valid objections to abandonments, and did not provide a reasonable opportunity for public participation. *Id.* at 1258. The court found, however, that ICC had addressed these concerns in subsequent orders. The court observed that the ICC "may not delegate to parties and intervenors its own responsibilities to independently investigate and assess the environmental impact of the proposal before it." *Id.* (citing *Harlem Valley Transportation Association. v. Stafford*, 500 F.2d 328, 336 (2d Cir. 1974)). Because ICC regulations not only required applicants to raise environmental concerns, but also provided that the ICC would conduct an independent EA, the court found it had met NEPA requirements.

The court also rejected petitioners' allegation that preparation of the EA after the notice of abandonment had been published in the *Federal Register* was improper. The court explained that publication in the *Federal Register* was not the final step in the process. Under the regulations, ICC would review the abandonment and assess environmental issues after publication of the notice and, thus, could still consider environmental concerns prior to making "'irretrievable commitments.'" *Id.* at 1259 (citing *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission,* 481 F.2d 1079, 1094 (D.C. Cir. 1973)). The court also looked favorably upon ICC's representation that it would automatically grant a stay of the abandonment when environmental issues were raised. Petitioners' argument that the standard for a stay imposed too high a burden was thus rejected.

Finally, the court found that ICC procedures provided a reasonable opportunity for public comment in accordance with NEPA. The EA would be available 5 days after the notice of abandonment was published and parties had 15 days to seek a stay. Because ICC indicated it would grant a stay based on a "minimal showing" of environmental concerns and, further, that its procedures allowed for extensions of time, the court found that the public had a reasonable opportunity to comment.

The court also found ICC procedures to accord with NHPA. Describing Section 106 of NHPA as a "stop, look, and listen" provision similar to Section 102 of NEPA, the court determined that NHPA's purpose was achieved as long as consultation occurred prior to the effective date of the exemption; it did not have to occur prior to publication of the notice of abandonment. 848 F.2d at 1261.

Finally, the court found that ICC complied with the National Trails System Act by providing that persons interested in recreational use of the rail lines could submit evidence regarding public use within 10 days of the notice of abandonment.

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Case 120

Indiana Coal Council v. Lujan, 774 F. Supp. 1385 (D.D.C. 1991), *vacated in part and appeal dismissed*, No. 91-5397 (D.C. Cir. Apr. 26, 1993).

The Office of Surface Mining Reclamation and Enforcement in the Department of the Interior (OSM) promulgated regulations in 1987 under the Surface Mining Control and Reclamation Act (SMCRA) setting forth procedures for the consideration of historic properties in connection with the issuance of surface coal mining permits. Such permits are issued by State regulatory authorities pursuant to a delegation by OSM to operate permitting programs in compliance with Federal laws. The regulations prompted suits, later consolidated, by several coal industry groups and by preservation groups, including the National Trust for Historic Preservation. Industry plaintiffs challenged the portion of the regulations that allowed a State regulatory authority to require permit applicants to conduct surveys to identify unknown historic sites or to condition permits to avoid or mitigate adverse effects. Preservation plaintiffs alleged that the regulations failed to comport with the National Historic Preservation Act (NHPA) because they authorized‹but did not require‹surveys prior to permit issuance. Thus, according to preservation plaintiffs, the regulations did not ensure that sites would be identified or that Section 106 compliance would occur prior to mining.

OSM filed a motion to dismiss both plaintiffs' claims. First, OSM alleged that SMCRA did not give the district court jurisdiction over a claim for mandatory and injunctive relief compelling compliance with NHPA. The court disagreed and found that SMCRA's plain language gave it broad power to direct OSM to comply with NHPA. 774 F. Supp. at 1393. Similarly, the court found it had jurisdiction to grant mandamus relief through the mandamus provision in 28 U.S.C. § 1361. 774 F. Supp. at 1393. The court also rejected OSM's argument that plaintiffs' reliance on Federal question jurisdiction was barred by sovereign immunity.

OSM cited certain post-rulemaking actions to support its argument that the case was moot. The court rejected the mootness claim, observing that those activities provided a basis for mootness only if the court, not OSM, determined that they brought OSM into compliance with NHPA. OSM also alleged that because it was in the process of working with States to revise State programs, plaintiffs' claims were not ripe. Rejecting this argument, the court found that the issues raised were fit for judicial review, since the regulations had been promulgated four years earlier and OSM had had ample opportunity to establish its position. *Id.* at 1395. Further, the court noted that the legislative history of SMCRA indicated that Congress intended to avoid delay in implementing the program; there would be hardship to the parties if the court withheld the decision. *Id.*

After denying OSM's motion to dismiss, the court addressed industry plaintiffs' allegations. Industry plaintiffs argued preliminarily that review of the regulations was impossible because the regulations did not provide an adequate statement of basis and purpose. The court found, however, that the preamble adequately explained that SMCRA provided the statutory basis for the regulations.

Challenging the substance of the regulations, industry plaintiffs alleged that SMCRA did not authorize requiring the information that the regulations imposed. With regard to the regulations' identification and mitigation requirements for historic properties, the court interpreted SMCRA as encompassing such requirements. *Id.* at 1397. According to the district court, SMCRA recognizes that OSM must comply with other Federal laws in carrying out its programs and, although NHPA is not specifically listed, SMCRA implicitly requires compliance with NHPA. Additionally, SMCRA gives OSM broad authority to promulgate regulations necessary to carry out the purpose of SMCRA, including mitigation requirements for historic properties even where valid existing rights are claimed. *Id.* at 1398-99. The court observed that "the very purpose of SMCRA is to strike a balance between the production of coal and the protection of the environment . . . ." *Id*. at 1399 (citing 30 U.S.C. § 1202).

Concluding that OSM was authorized to promulgate regulations on identification and mitigation of adverse effects to historic properties, the court then examined whether the regulations fulfilled the requirements of NHPA. OSM

conceded that approval of State programs, review and approval of amendments to State programs, and grants of Federal monies to such programs constitute undertakings requiring compliance with Section 106. *Id.* at 1400. OSM also conceded that individual permit decisions made by OSM directly in States without approved programs, and permits issued by OSM on Federal lands, are also undertakings. *Id.* However, OSM argued that permits issued by State agencies pursuant to a delegated program from OSM are not undertakings.

The court disagreed with OSM and held that permits issued by State agencies pursuant to a delegated authority from OSM are undertakings requiring compliance with Section 106. The court found OSM's ongoing involvement in the program to be significant and distinguished the case from *Lee v. Thornburgh,* 877 F.2d 1053 (D.C. Cir. 1989). First, the court noted that State programs receive 50 to 80 percent of their funding from OSM. The court next determined that OSM had a "powerful oversight role" over State agencies, noting that SMCRA requires OSM to inspect operations and evaluate State programs, issue notices of violation when warranted, and declare cessation orders where violations pose significant and imminent environmental harm. 774 F. Supp. at 1401. The court further noted that SMCRA requires OSM to take over a State program if the State is not properly carrying out the program. *Id.* The legislative history of SMCRA also indicated that Congress desired Federal oversight over State permit programs.

The court distinguished several cases where courts held that NEPA did not apply to State permit decisions involving other delegated Federal programs, *id.* at 1402-03, noting that it was unclear whether Congress intended NHPA and NEPA to be co-extensive, particularly because NEPA's threshold appeared higher than that of NHPA. *Id*. at 1402 n 13. The court remanded the case to the Secretary of the Interior to bring OSM into compliance with NHPA and its finding that permits issued through State programs are Federal undertakings.

OSM and industry plaintiffs appealed the district court decision. The Court of Appeals for the District of Columbia Circuit dismissed the appeals of the preservation plaintiffs, finding that the 1992 amendments to NHPA rendered the appeals moot. [Ed. note: The 1992 amendments essentially codified the district court's ruling that State permits issued pursuant to a federally delegated program are undertakings.] Because of the 1992 amendments, the court of appeals also vacated "that portion" of the district court opinion "holding that the OSM regulations failed to comply with the NHPA." Although the industry plaintiffs' appeal was not declared moot, they later dismissed their appeal voluntarily.

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Case 38

***Inman Park Restoration, Inc. v. Urban Mass Transportation Administration*, 414 F. Supp. 99 (N.D. Ga. 1975), *supp. order*, 414 F. Supp. 121 (N.D. Ga. 1976), *aff'd per curiam sub nom. Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Authority*, 576 F.2d 573 (5th Cir. 1978).**

Residents of an area in Atlanta, Georgia, through which a proposed mass transit system was to run sought to enjoin construction of the system. The system, first proposed in 1962, was to be built with Federal money from the Urban Mass Transportation Administration (UMTA) of the Department of Transportation. The system would affect the Inman Park neighborhood, a historic district listed in the National Register of Historic Places in 1973: the DeKalb County Courthouse, listed in 1971; and Sycamore Street, determined eligible for the Register in 1975.

After failing to obtain a temporary restraining order, plaintiffs sought to require UMTA to prepare a supplemental environmental impact statement under the National Environmental Policy Act (NEPA) and to comply with Section 106 of the National Historic Preservation Act (NHPA). The agency had completed an environmental impact statement (EIS) in 1973.

First, the court rejected defendants' laches defense. Although a great deal of time and money had been spent, it represented only a small percentage of the total to be spent, and no construction had begun. Thus, although the project had been publicized for many years, there would be no undue prejudice to defendants in allowing the suit to proceed. 414 F. Supp. at 111.

Second, the court examined the EIS and found it to be adequate, with a sufficiently detailed analysis of the impacts of the system on the historic properties. *Id.* at 119. That Sycamore Street was determined to be eligible for the Register after the EIS was completed triggered NHPA but was not so substantial a change as to require a supplemental EIS under NEPA. *Id.* at 118.

Plaintiffs also alleged that defendants failed to comply with Section 106 of NHPA and Section 4(f) of the Department of Transportation Act. Because these processes were underway within the agency and not completed, the court initially held that these claims were not ripe for review. *Id.* at 121. After the Section 106 and Section 4(f) processes had been completed, the court reconsidered plaintiffs' claims.

Because plaintiffs' supplemental briefs did not raise any specific contentions concerning defendants' Section 106 compliance, the court concluded that defendants had complied with Section 106. *Id.* at 121 n. 1. Furthermore, the court held that defendants' Section 4(f) statement was not arbitrary or capricious. *Id.* at 128 29.

The Fifth Circuit affirmed without further comment on the NHPA and Section 4(f) claims.

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Case 14

James v. Lynn, 374 F. Supp. 900 (D. Colo. 1974).

Landowners sought to enjoin the demolition of buildings of possible historic significance, none of which had been listed in the National Register of Historic Places. The demolition was to occur as part of the East Side Urban Renewal Project, funded by the Department of Housing and Urban Development (HUD). Although HUD had prepared an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), the EIS did not discuss historic resources. Moreover, the agency had made no attempt to comply with Executive Order No. 11593 or the National Historic Preservation Act (NHPA). Although plaintiffs alleged that the EIS was inadequate and that HUD was required to comply with Executive Order No. 11593 and Section 106 of NHPA, the only relief that they sought was to require HUD to prepare an adequate EIS.

The court first assumed, for the purposes of the case, that Executive Order No. 11593 established a procedure that must be followed in preparing an EIS. Although HUD had not followed these steps and had not considered historic resources in its EIS, the court declined to require HUD to conduct the procedures required by Executive Order No. 11593 because plaintiffs' presentation at the hearing of evidence as to the historic qualities of the area had served to provide HUD with sufficient information to decide whether to proceed with the undertaking. The court agreed that it would have been better had the information on historic resources been available in the EIS, but held that NEPA had been satisfied because the buildings were still standing and the plans could still be changed. Because the court believed that to require HUD to comply with Executive Order No. 11593 would be a needless act, it declined to issue the requested injunction. 374 F. Supp. at 903.

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Case 57

Kansas v. Adams, 608 F.2d 861 (10th Cir. 1979), *cert. denied sub nom. Spannaus v. Goldschmidt*, 445 U.S. 963 (1980).

This suit sought to prevent the termination of passenger rail service on three routes. Plaintiffs alleged that the Secretary of Transportation failed to comply with the National Historic Preservation Act (NHPA), among other statutes, in preparing a report on the plan for curtailing passenger service on these routes. The court granted plaintiffs' motion for a temporary restraining order, discussing in some depth the factors that it considered in granting the restraining order. On September 29, 1979, the President signed into law the AMTRAK Reorganization Act. The court concluded that, by enacting this law, Congress had adopted and approved the Secretary's report, thus creating a "statutory route structure." 608 F.2d at 865-67. Without elaborating, the court found that there was no necessity for compliance with NHPA and dissolved the restraining order. *Id.* at 866.

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Case 1

Kent County Council for Historic Preservation v. Romney, 304 F. Supp. 885 (W.D. Mich. 1969).

Plaintiff, a nonprofit corporation, brought suit to enjoin the demolition of the old Grand Rapids City Hall, proposed under an urban renewal plan adopted by the city of Grand Rapids. The city planned to use funds acquired from the Department of Housing and Urban Development (HUD) under a loan and capital grant contract executed in 1961, prior to the enactment of the National Historic Preservation Act (NHPA). In 1965, a private bank agreed to buy various parcels of land from the city, including the city hall site, on the condition that the bank bid for all of the parcels or for none at all. The bank then paid for all of the parcels except the city hall site, which had not yet been vacated, and, relying on the city's promise to deliver the city hall site, built a large office building on the sites it had acquired. In 1968, HUD approved the city's certification of completion, the final approval required under the grant contract, although HUD had not yet paid all of the grant money to the city.

Plaintiff argued that HUD was required to comply with Section 106 of NHPA because there were further funds to be distributed under the grant contract. The court rejected this claim, noting that the operative moment for Section 106 applicability was "prior to approval of the expenditure," not prior to expenditure. 304 F. Supp. at 888. The court, however, did not squarely reach the merits of the case, because it held that plaintiff was not entitled to judicial review and did not have standing to maintain the action. *Id.* at 890. The court faulted the complaint because it contained no allegations of arbitrary and capricious conduct involving discretionary agency action and did not seek review of agency action. *Id.* at 889. Plaintiff failed to establish that it had any interest that would give it the right to bring the suit. The court granted defendants' motions to dismiss. *Id.* at 890.

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Case 137

Knowles v. United States Coast Guard, 1997 WL 151397 (S.D.N.Y. 1997).

This case arose out of the U.S. Coast Guard's decision to close its Support Center on Governors Island, New York. Plaintiffs, Knowles et al., alleged that defendants, the Coast Guard, failed to comply with the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), Freedom of Information Act, and other Federal ethics laws and regulations. Plaintiffs sought a preliminary injunction to prevent the Coast Guard from executing its plan to discontinue all of its operations on Governors Island. Following a decision in 1996 denying the preliminary injunction, both plaintiffs and defendants filed cross motions for summary judgment. Among the important issues raised in this case were segmentation, the integration of an agency's NEPA and NHPA obligations, and the use of an independent contractor to prepare NEPA documentation.

Plaintiffs claimed that the Coast Guard improperly "segmented" its environmental review process in order to avoid NEPA's requirement of preparing an Environmental Impact Statement because they saw it as a foreseeable event that the Coast Guard would "dispose" of the property after the Support Center was closed. Therefore, they argued, the actions of disposal and closure were interdependent. The court stated that "only when a given project effectively commits decision makers to a future course of action will this form of linkage argue strongly for joint environmental evaluation." Based on the evidence presented, the district court found that the closure of the Support Center did not commit the property either to disposal or to the sale and re-development anticipated by plaintiffs. In view of these circumstances, the court determined that the Coast Guard did not segment the project in order to circumvent any provisions of NEPA.

Plaintiffs further claimed that the Coast Guard violated NEPA and NHPA not only by failing to perform the review processes concurrently, but also by signing the Finding of No Significant Impact (FONSI) prior to concluding NHPA Section 106 review process. Additionally, plaintiffs complained that there was no public participation in the development of the Programmatic Agreement (PA) under Section 106 addressing the effects of the closure action. The Council on Environmental Quality's (CEQ) regulations call for the integration of the NEPA requirements "with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively." The court also noted that NHPA's implementing regulations contemplate that NEPA and NHPA review should be integrated closely, but both the Section 106 and CEQ regulations allow for phased compliance and implementation of reviews in a flexible manner. The record showed that the Coast Guard had initiated Section 106 review at the outset of the NEPA process and had negotiated with various parties to finalize a PA and formulate caretaker provisions before issuing the FONSI. It also indicated that individuals, organizations, and local authorities participated in the NEPA process.

In summary, the court concluded that the Coast Guard was not required to complete the Section 106 process before issuing the FONSI, and to the extent that plaintiffs complained about the level of public participation in the PA, the court stated that this agreement is not an "environmental document" subject to the public notice provisions of 40 C.F.R. Section 1506(b).

Plaintiffs also questioned the Coast Guard's use of non-agency personnel, independent contractors, to prepare the environmental studies, and asserted that this violated NEPA. The court dismissed this contention, stating that a Government agency is permitted to use outside consultants to prepare environmental documents provided that the agency independently reviews and verifies the underlying data.

After reviewing plaintiffs' multiple arguments, the court found that they had failed to demonstrate the existence of any material issue of disputed fact, and, dismissing the complaint, awarded summary judgment in favor of the Coast Guard.

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Case 100

Lee v. Thornburgh, 707 F. Supp. 600 (D.D.C.), *rev'd*, 877 F.2d 1053 (D.C. Cir. 1989).

Community groups and residents of southeast Washington, D.C., brought suit to block construction of a new correctional treatment facility on the Gallinger Hospital site, a place nominated to the National Register of Historic Places. The project was funded by direct congressional appropriation to the District of Columbia at the urging of the Department of Justice. The Justice Department bears responsibility for designating the place of confinement for those convicted of offenses; however, it has no role in the construction and operation of District of Columbia prisons.

Plaintiffs argued that Sections 106, 110(b), and 110(d) of the National Historic Preservation Act (NHPA) applied to the project because the project received Federal assistance. The district court found that NHPA applied because the prison would be built on Federal land with Federal funds appropriated by Congress and, because Federal approval was required before the site could be used.

The court of appeals reversed the district court, declining to adopt the lower court's interpretation of the scope of NHPA and holding that its provisions do not apply since the planning and construction of the facility was neither funded nor dependent on approval by a Federal agency.

Reviewing the statutory text of NHPA, the court of appeals found that "Congress intended these provisions to have a limited reach." 877 F.2d at 1056. The court examined Sections 106, 110(b) and 110(d) and reasoned that "NHPA imposes obligations only when a project is undertaken either by a federal agency or through the auspices of agency funding or approval." *Id.* Moreover, the court interpreted Section 106 to impose historic preservation obligations on agencies in only two situations: where an agency has the authority to license a project or to approve the expenditure of project funds.

Examining Section 110(d) of NHPA, the appellate court found that "obligations are imposed when federal agencies have the authority to license a project or to provide assistance" to a project. *Id.* According to the court, "providing federal assistance" means "approving the expenditure of federal funds." *Id.* at 1056-57. The court explained that the doctrine of *in pari materia* applied, thus, Sections 106 and 110(d) should be read in conjunction. Citing a report from the House of Representatives, the court noted that the legislative history of Section 110 supported the court's interpretation: the House report stated that Section 110 "clarifies and codifies" agencies' responsibilities under NHPA but does not intend to change them. *Id.* at 1057. If it were to read the phrase "Federal assistance" in Section 110(d) broadly, the court stated, it would expand the limits of NHPA beyond the responsibilities of Section 106 and deviate from the intent of Congress.

The court of appeals also construed the language of Section 110(b) narrowly, holding that "agency action" referred to the granting of a license or other required approval, while "assistance" referred to the approval of expenditure of funds.

In analyzing Sections 106, 110(d) and 110(b), the court concluded that no Federal agency had approved funds for the proposed correctional treatment facility because the funds for the project were appropriated directly by Congress to the District of Columbia. *Id.* The court also found that no agency held an approval function with respect to the facility. Although the D.C. government sought the Justice Department's agreement to the site and the Justice Department cleared it with both the General Services Administration and the Department of the Interior, the court stated that "none of these agencies actually claim to have had the authority to grant or refuse permission." *Id.* Because the agency's involvement was limited to encouraging Congress to appropriate funds for the prison and to identifying property under Federal jurisdiction as possible sites, the court found that "such a negligible involvement as occurred here does not trigger the provisions of NHPA." *Id.* at 1058.

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Case 39

Libby Rod & Gun Club v. Poteat, 457 F. Supp. 1177 (D. Mont. 1978).

Plaintiffs sought a preliminary injunction to stop the Army Corps of Engineers from constructing a dam on the Kootenai River in Montana, alleging that the dam would adversely affect several archeological sites. The Corps had prepared an environmental impact statement (EIS) under the National Environmental Policy Act prior to the determination that the archeological sites were eligible for the National Register of Historic Places, but it had not complied with the National Historic Preservation Act (NHPA).

The court found that the Corps' EIS was inadequate in several respects and directed the Corps to revise the EIS. The new EIS must consider the impact of the project on the archeological sites. 457 F. Supp. at 1189.

Next, the court held that plaintiffs had not established a likelihood of success on the merits of their NHPA claims. Nevertheless, because the Corps was enjoined from construction activities on other grounds, it would have additional time in which to complete additional archeological survey and salvage activities. *Id.* at 1190.

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Case 4

Miltenberger v. Chesapeake & Ohio Railway, 450 F.2d 971 (4th Cir. 1971).

Plaintiffs sought to enjoin a railway from demolishing a railway station and hotel listed in the National Register of Historic Places as a National Historic Landmark. The district court denied the requested relief, and plaintiffs sought an injunction pending appeal. The city in which the buildings were located had at one point applied to the Department of Housing and Urban Development (HUD) for a grant to purchase and restore the property, but the city had changed its mind and refused the HUD money. Although HUD was no longer involved, plaintiffs argued that because defendant's passenger service was regulated by AMTRAK, a federally created corporation, the requirements of the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) must be met before the buildings could be demolished.

Noting that the station and hotel had been abandoned by the railway before the enactment of the AMTRAK legislation, the Fourth Circuit concluded that the hotel did not fall within AMTRAK's jurisdiction but was a private parcel owned by the railway and unrelated to rail passenger service. 450 F.2d at 974. However, continued the court, even assuming that AMTRAK had jurisdiction to prevent abandonment of the hotel, AMTRAK is not a Federal agency for purposes of NHPA and NEPA, but rather a private corporation under the terms of its enabling statute. *Id.* at 974-75. Because there was no Federal agency involved, neither NHPA nor NEPA was applicable. The court denied the motion for injunction pending appeal. *Id.* at 975.

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Case 23

Montana Wildlife Federation v. Morton, 406 F. Supp. 489 (D. Mont. 1976).

Plaintiffs challenged an environmental impact statement (EIS) prepared under the National Environmental Policy Act by the National Park Service (NPS) for a segment of a proposed road and NPS's decision to proceed with the project.

Specifically, plaintiffs claimed that the EIS was inadequate because it did not thoroughly assess the project's impacts on archeological resources. Plaintiffs' evidence showed that there was disagreement within the scientific community on the archeological impacts.

The court rejected plaintiffs' claims, ruling that disagreement among experts cannot alone invalidate an EIS. The EIS adequately analyzed the historical and archeological sites involved. 406 F. Supp. at 491.

Plaintiffs also argued that NPS violated the National Historic Preservation Act (NHPA), Executive Order No. 11593, and the Council's regulations implementing Section 106 of NHPA regarding the archeological sites. Without further explanation, the court found that the agency had taken adequate protective measures to ensure the preservation of the sites. *Id.*

Finally, the court concluded that it could not reverse the NPS decision simply because the plaintiffs did not like that decision or because the experts disagreed on the feasibility or desirability of the road. *Id.* at 491-92.

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Case 149

***Morongo Band of Mission Indians v. Federal Aviation Administration,* 161 F.3d 569 (9th Cir. 1998).**

Plaintiff, the Morongo Band of Mission Indians, petitioned for a review of the decision by defendant, the Federal Aviation Administration (FAA), to implement the Los Angeles International Airport East Arrival Enhancement Project, and raised claims under the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), Section 4(f) of the Transportation Act, and various FAA regulations.

The court first stated that agency decisions under NHPA and Section 4(f) were to be reviewed under the arbitrary and capricious standard.

The court then dealt with the argument made by the tribe that the court must apply the "usual canon of construction that a statute designed to benefit Indians must be liberally construed in favor of the Indian beneficiaries," citing *Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250, 1257 (9th Cir. 1994). The court stated that, although the United States owes a general trust responsibility to Indian tribes, unless there is a specific duty placed on the Government with respect to Indians, the responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at Indian tribes. The court believed that the statutes at issue in this case were not designed to benefit Indian tribes.

Among other things, the tribe also claimed that FAA violated NHPA when it did not prepare an Environmental Impact Statement (EIS) as required by NEPA and FAA Order 1050. The FAA order requires the preparation of an EIS when agency action has an effect that is "not minimal" on properties protected by NHPA. The court noted that FAA stated in the Environmental Assessment (EA) that the only change that would result from the project would be an increase in "high altitude aircraft overflights." The assessment also stated FAA's conclusion that the project would cause no adverse impacts and that any surrounding historic resources would be unaffected by any of the alternatives. The court reasoned that because the effect would be minimal, an EIS was not required pursuant to FAA Order 1050.

The tribe also argued that FAA had not made a reasonable and good faith effort under Section 106 of NHPA to identify all properties eligible for the National Register of Historic Places because it failed to follow up on information that indicated the existence of such properties. The court distinguished this case from *Pueblo of Sandia v. United States,* 50 F.3d 856 (10th Cir. 1995), finding that "FAA's conclusion was not based on a finding of no cultural properties in the area, but on the fact that the noise and other studies showed that there would be no impact on *any* type of property in the project area" (emphasis added). Accordingly, the court decided that the failure to identify specific potential sites or properties is irrelevant.

The tribe further argued that NHPA required FAA to obtain the tribe's consent prior to implementing the project. It cited Section 106 of NHPA, which states: "The Agency Official shall invite the State Historic Preservation Officer, and the Council should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties. When an undertaking will affect Indian lands, the Agency Official shall invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement." 36 CFR Section 800.1(c)(2)(iii). The court found that consent from the tribe was not necessary in a case such as this, where the effect on cultural properties was insignificant or minimal.

The court concluded its review with an analysis under Section 4(f) of the Transportation Act, finding that it did not apply here since the increased high-altitude air traffic would have an insignificant effect on the "use" of the land.

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Case 81

Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir.), *fees awarded*, 730 F.2d 94 (3d Cir. 1983).

In 1968, the Department of Housing and Urban Development (HUD) approved an urban renewal plan submitted by the town of Dover, New Jersey, that provided for demolition of a number of buildings in the town, including the Old Stone Academy. The following year, HUD and the town entered into a loan and capital grant contract under which HUD was to fund the previously approved plan. The contract imposed on the town a continuing responsibility to supply HUD with documentation concerning any proposed actions pertaining to the project, and HUD retained the authority to demand alterations in the plan based on the data provided. The grant contract was closed out on April 16, 1982. The Old Stone Academy was determined to be eligible for the National Register of Historic Places and was listed in the Register on May 21, 1982.

HUD did not comply with either the National Historic Preservation Act (NHPA) or the National Environmental Policy Act (NEPA), arguing that NHPA did not apply because at the time the renewal plan was approved, the academy was neither listed nor eligible for listing in the National Register and that NEPA did not apply because it had been enacted after the grant contract was executed. Plaintiffs sought to enjoin demolition of the academy until the agency complied with these two statutes.

The court began its discussion of plaintiffs' NHPA allegations by noting that NHPA, like NEPA, is primarily a procedural statute designed to ensure that Federal agencies take historic values into account in their decisionmaking. 714 F.2d at 278-79.

Next, the court held that the requirement of Section 106 of NHPA that agencies take historic properties into account and provide the Advisory Council on Historic Preservation an opportunity to comment "prior to the approval of the expenditure of any Federal funds" means that NHPA must be applied to ongoing Federal actions as long as a Federal agency has opportunity to exercise authority and at any stage of an undertaking at which alterations might be made to modify the undertaking's impact on historic preservation goals. *Id.* at 280. To reach its decision, the court first examined the language and legislative history of NHPA. Although neither mention the statute's application to ongoing projects, the court noted that Congress intended the statute to draw a meaningful balance between the goals of historic preservation and community development, a purpose served by applying NHPA to ongoing projects at every stage at which a Federal agency has authority either to approve or disapprove Federal funding or to provide meaningful review of historic preservation and community development goals. *Id.* at 279-80.

The court also cited as support for its conclusion the definitions of "decision" and "undertaking" in Sections 800.2(h) and (c) of the Council's regulations implementing Section 106 of NHPA. *Id.* at 280. The court found the Council's regulations to be "particularly persuasive" concerning the proper interpretation of NHPA because Congress was aware of and had considered the regulations in 1976 and 1980 when it amended NHPA and had failed to change the Council's construction. *Id.* at 280-81. To infer Congressional intent from inactivity was proper here because the Council's interpretation is consistent with the purpose of NHPA. *Id.* at 281. The court rejected HUD's contention that this interpretation of NHPA could be used to delay or halt projects, reasoning that courts will respect reasonable agency procedures for updating past reviews. *Id.*

Although the academy had not been formally determined to be eligible for or listed in the Register until 1982, the court found that in 1976 it was an "eligible property" as defined in the Council's regulations. Because HUD had opportunity at that time to effect changes in the plan, based on its review of the city's data submitted under the contract, it was required to comply with Section 106. *Id.* at 282.

Finally, the court held that HUD must comply with NEPA, finding that HUD's continuing involvement in the project

was a "major Federal action" requiring an environmental impact statement. *Id.* at 275. NEPA, too, applies at any stage of an ongoing project, even if begun prior to 1970, in which a Federal agency has authority to alter the substance of the project. *Id.* at 277. The court cited Executive Order No. 11593's requirement that Federal agencies administer properties under their control in accordance with historic preservation goals as support for its conclusions regarding NEPA. *Id.* at 276.

In a later opinion, the appellate court considered plaintiffs' motion for attorneys' fees and costs under Section 305 of NHPA. The court rejected HUD's argument that Section 305 allowed fees and costs only for proceedings in the district court, holding that plaintiffs could recover fees and costs for successful services rendered in a court of appeals as well as in the district court. Moreover, there is no requirement that the district court make the award for appellate services, for the court of appeals may award fees and costs for services in the appellate court. However, the court determined that plaintiffs' application for fees was insufficiently documented and directed them to file further information. 730 F.2d at 96.

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Case 155

Muckleshoot Indian Tribe v. United States Forest Service, 177 F.3d 800 (9th Cir. 1999).

Plaintiffs-appellants Muckleshoot Indian Tribe, et al. ("Muckleshoot Tribe"), argued that the Forest Service violated the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) when it exchanged lands with Weyerhauser Company ("Huckleberry Exchange"). Although the district court had granted summary judgment in favor of the Forest Service, the circuit court reversed.

With the goal of unifying land ownership, thereby enhancing resource conservation and management, the Forest Service traded lands with Weyerhauser, a logging company. Weyerhauser intended to log the lands it received in the Huckleberry Exchange. Included within the lands traded to Weyerhauser were intact portions of the Huckleberry Divide Trail, a historic property important to the Muckleshoot Tribe.

On its appeal, the Muckleshoot Tribe argued that the Forest Service had violated NHPA by 1) failing to consult adequately with the tribe regarding the identification of traditional cultural properties; 2) inadequately mitigating the effects on historic properties; and 3) failing to nominate certain sites to the National Register. The circuit court agreed regarding the claim of inadequate mitigation.

The circuit court found that the Forest Service had adequately consulted with the tribe. The circuit court noted that, unlike the case in *Pueblo of Sandia v. United States* (see Case 132), the Forest Service had not withheld relevant information nor shown bad faith. Moreover, the record showed that the Forest Service had researched historic sites, communicated several times with the tribe, and excluded another site of importance to the tribe from the Huckleberry Exchange. The circuit court noted that the Forest Service could have been more sensitive to the tribe regarding other sites, the information of which the tribe refused to provide. Nevertheless, the Forest Service continued seeking the information over a period of time and had previously conducted research of its own. The circuit court was unable to conclude that the Forest Service had failed to make a reasonable and good faith effort to identify historic properties of importance to the tribe.

However, the circuit court found that the Forest Service violated NHPA by failing to adequately mitigate the adverse effect of the exchange on the Huckleberry Divide Trail. As stated before, Weyerhauser planned to log the lands it would get in the Huckleberry Exchange. Such logging could adversely affect the trail and render it ineligible for the National Register. The Section 106 regulations in place at the time of the exchange provided three options under which a Federal agency could mitigate an otherwise adverse effect so that it could be considered as not being adverse. The two options at issue in this case set forth that an adverse effect could be considered not adverse where 1) appropriate research was conducted, provided that "the historic property is of value only for its potential contribution to archeological, historical, or architectural research"; or 2) in the context of a land transaction, "adequate restrictions or conditions [were] included to ensure preservation of the property's significant historic features." The Forest Service argued it was correctly utilizing these two options by mitigating the effects through photographing and mapping the trail before the exchange.

The circuit court, however, found that such activities did not meet the requirements of the two mitigating options listed above. The first option was inapplicable since the Muckleshoot Tribe valued the trail for more than its potential contribution to scientific research. The second option was inapplicable as well since photographing and mapping would not preserve the trail's significant historic features. The circuit court pointed to a letter by the Washington State Historic Preservation Officer indicating that documentation was "probably not an effective mitigation measure." Having found this violation of NHPA, the court declined to address the third NHPA allegation.

Plaintiffs-appellants also argued that the Forest Service violated NEPA through 1) inadequate identification and

analysis of cumulative environmental impacts in the Environmental Impact Statement (EIS); 2) inadequate definition of the purpose and need for the land exchange; and 3) insufficient identification and evaluation of alternatives for the exchange. The circuit court agreed with the first and third NEPA arguments of the plaintiffs-appellants.

The Muckleshoot Tribe contended that the EIS did not adequately consider the cumulative impacts of logging connected to a land exchange in 1984, to current logging activities, and to a future land exchange in the vicinity. The district court had held that the Forest Service did not need to consider such impacts since the 1984 land exchange was already considered in an earlier land management plan, and the future land exchange was too uncertain. The circuit court disagreed. It first noted that NEPA allowed reference to past consideration (also known as "tiering") but only with regard to an EIS—not to a land management plan. Furthermore, the EIS for the land management plan did not account for the specific impacts of the Huckleberry Exchange. The Huckleberry Exchange was only mentioned in a pool of possible projects, without any detail concerning it or its impact.

Furthermore, the cumulative impact analysis on the EIS for the Huckleberry Exchange was deemed by the circuit court to be too general and one-sided. It was devoid of specific, reasoned conclusions. In addition, it did not evaluate the impact of logging on the natural resources on the land transferred to Weyerhauser.

Regarding the future land exchange in the vicinity ("Plum Creek Exchange"), the circuit court agreed with the tribe that such an exchange was "reasonably foreseeable" and that its cumulative impacts should have been adequately analyzed. Before the Huckleberry Exchange EIS was issued, the Forest Service had prepared a summary of the Plum Creek Exchange, and the Secretary of Agriculture had formally announced the exchange to the public.

The circuit court disagreed with the plaintiffs-appellants' assertion that the purpose and need in the EIS of the Huckleberry Exchange was too narrow. The purpose and need was to "consolidate ownership and enhance future resources conservation and management by exchanging parcels of National Forest System and Weyerhauser land." The circuit court found the breadth of the purpose and need to be reasonable.

However, the circuit court held that the Forest Service failed to consider an adequate range of alternatives to meet the stated purpose and need of the Huckleberry Exchange. The Forest Service only considered three alternatives: a no action alternative and two alternatives that only differed in that one labeled the land transfer as a donation, rather than as an exchange, and added 141 acres of donated land. The Forest Service failed to consider an alternative where it would purchase the land from Weyerhauser rather than exchanging for it. The circuit court also found that the Forest Service should have closely considered a trade involving deed restrictions or other modifications to the acreage involved.

Finally, the circuit court considered Weyerhauser's argument that the case was moot because the patents and deed to the exchanged lands had been conveyed and logging permits from Washington had been secured. Weyerhauser attorneys also stated in oral arguments that their company had already "destroyed" at least 10 percent of the land it obtained on the exchange. The circuit court held that the case was not moot. It noted that conveyance of property does not moot a case, and that Federal courts are authorized to void a property transaction. The evidentiary burden needed to establish mootness was not met. The circuit court then enjoined any further activities pursuant to the Huckleberry Exchange until the Forest Service satisfied its NHPA and NEPA obligations.

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Case 65

Nashvillians Against I-440 v. Lewis, 524 F. Supp. 962 (M.D. Tenn. 1981).

Plaintiffs opposed construction of an interstate freeway around Nashville, Tennessee. The highway was to run near several historic districts. One, the Richland-West End Historic District, had been listed in the National Register of Historic Places in 1979. Three others‹the Granny White Pike and Grave, West End Heights Historic District, and Glen Oak Historic District‹were determined eligible for inclusion in the Register after the Department of Transportation (DOT) submitted to the Secretary of the Interior documentation of the properties' significance developed as part of the environmental impact statement prepared for the project under the National Environmental Policy Act.

DOT determined that the project would have no adverse effect on the Glen Oak District and, as required by the regulations of the Advisory Council on Historic Preservation implementing Section 106 of the National Historic Preservation Act (NHPA), submitted to the Council a preliminary case report for the other districts. The Federal Highway Administration (FHWA) of the Department of Transportation, the Council, and the State Historic Preservation Officer (SHPO) pursued the consultation process established by the Council's regulations and executed a Memorandum of Agreement (MOA) on the project. FHWA also prepared a statement of compliance with Section 4(f) of the Department of Transportation Act for part of the highway.

Plaintiffs first argued that FHWA was required to prepare additional Section 4(f) statements on other areas affected by the project. They argued that noise, air pollution, land use alteration, blasting damage, and property value diminution would affect and amount to a "use" of the historic properties. Furthermore, they asserted, it was not necessary to show actual use of the land upon which the historic properties were located.

The court rejected plaintiffs' "constructive use" theory. Rather, the court found that plaintiffs must demonstrate that the claimed harm would affect the historic value or quality of the property to show constructive use. Since the properties involved were designated as historic districts because of their architectural integrity and the harm that plaintiffs claimed would not affect these features, there was no constructive use. 524 F. Supp. at 975-76.

Moreover, plaintiffs' evidence as to the claimed adverse consequences of the project was insufficient to find "use." *Id.* at 977. The court also noted that a Section 4(f) statement is not required for every property included within the purview of Section 106 of NHPA. *Id.* at 977 n. 37.

Second, plaintiffs alleged violations of NHPA. They claimed that another historic district, the Belmont Hills Historic District, which was not listed in the Register when the final environmental impact statement was prepared, was entitled to Section 106 protection and that DOT's historic review was inadequate. The court rejected these arguments because the SHPO had indicated that the Belmont Hills area was ineligible at the time that the EIS was prepared and plaintiffs had made no showing that the Council was denied its opportunity to comment or that the required procedures were not followed. *Id.* at 979.

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Case 58

National Center for Preservation Law v. Landrieu, 496 F. Supp. 716 (D.S.C.), *aff'd per curiam*, 635 F.2d 324 (4th Cir. 1980).

Plaintiffs brought suit to enjoin the city of Charleston, South Carolina, from building a hotel and convention center complex in the city's historic district, an area listed in the National Register of Historic Places. The project, the Charleston Center, was to be funded in part with an urban development action grant from the Department of Housing and Urban Development (HUD) and a public works grant from the Economic Development Administration (EDA) of the Department of Commerce. HUD, acting as the "lead agency," had delegated to the city its responsibilities under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). The city thus became the "Federal official" and prepared an environmental impact statement (EIS) under NEPA and sought the comments of the Advisory Council on Historic Preservation as required by Section 106 of NHPA.

As a result, the city, the Council, HUD, EDA, and the State Historic Preservation Officer (SHPO) entered into a Memorandum of Agreement (MOA) under the Council's regulations implementing Section 106. EDA did not delegate its responsibilities under these statutes but participated in the NEPA and NHPA processes as a "cooperating agency." During the pendency of the city's grant application to EDA a United States Senator from South Carolina wrote to EDA and the Council in support of the project.

Plaintiffs alleged, among other things, that HUD's delegation to the city of responsibilities for environmental and historic review was improper, the MOA was invalid, the Council was not allowed an opportunity to comment on the project, and the Council had violated its regulations in conducting the Section 106 process.

The district court first discussed the appropriate standard of review and concluded that judicial review should be based on the administrative record already in existence. 496 F. Supp. at 724.

Next, the court held that HUD's delegation to the city of HUD's substantive responsibilities under NEPA and NHPA was authorized by Section 104(h) of the Housing and Community Development Act. Under such delegation, the applicant for the grant, rather than HUD, must act as the "Federal agency" under NEPA and as the "agency official" under NHPA and the Council's regulations. *Id.* at 739. HUD's responsibilities are limited to determining that the applicant has followed all of the procedural requirements of the two acts and their attendant regulations. *Id.* at 731, 740. EDA's involvement as "cooperating agency" was proper. *Id.* at 732, 740.

Third, the court upheld the city's environmental impact statement as adequate. The EIS discussed the effect of the project on historic structures in the area and incorporated the MOA, which explored alternatives and established measures to mitigate the adverse effects of the project on the historic area. *Id.* at 736.

Fourth, the court held that the Council's regulations do not violate NHPA. NHPA does not specify the method by which the Council is to comment and gives the Council the authority to promulgate regulations to implement Section 106. The method by which the Council defines its opportunity to comment and promulgates its regulations is left entirely to the Council's discretion. *Id.* at 742.

The court further held that the Council had complied with its Section 106 regulations. Under the regulations, the MOA was properly executed by the Executive Director and ratified by the Vice Chairman. The MOA constituted the comments of the Council for purposes of NHPA. The Vice Chairman was authorized to ratify the MOA instead of placing the matter before the full Council membership for consideration. *Id.* at 741.

Finally, the court rejected plaintiffs' allegations that the defendants' decisions had been influenced improperly by political pressure. The court found that there is nothing improper in elected officials expressing their views on Federal projects to Federal officials or in attempting to secure federally funded projects for their constituents. *Id.* at 745.

The court concluded by noting that the Federal statutes do not empower the court to pass on the merits of a project. The court's role is to determine whether the Federal agencies have complied with the necessary procedural requirements. *Id.* at 745-46.

The Fourth Circuit affirmed the district court's decision *per curiam.*

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Case 66

National Indian Youth Council v. Andrus, 501 F. Supp. 649 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981).

In 1968, two mining companies and the Navajo tribe entered into a lease for the extraction of coal from Navajo lands. The lease was approved by the Secretary of the Interior the same year. In 1973, the mining companies proposed a coal gasification project on the leasehold. In response, the Bureau of Reclamation of the Department of the Interior conducted environmental studies of the proposed project and ultimately issued an environmental impact statement under the National Environmental Policy Act (NEPA). The mining companies submitted a mining and reclamation plan, which was revised and approved in 1978. Meanwhile, the mining companies, the Advisory Council on Historic Preservation, the State Historic Preservation Officer, and the Department of the Interior entered into a Memorandum of Agreement (MOA) under the Council's regulations implementing Section 106 of the National Historic Preservation Act (NHPA). The MOA, executed in 1978, provided for compliance with Section 106 in phases prior to each new mining activity.

Plaintiffs sought to enjoin the mining activities on grounds that approval of the mining lease in 1968 violated NEPA, NHPA, Executive Order No. 11593, the Historic and Archeological Data Preservation Act (HADPA), and other laws. They argued that NHPA required the Interior Department to inventory and survey all archeological sites on the leasehold prior to approving the lease. The parties to the lawsuit agreed that compliance with NHPA was required but disagreed as to the proper timing for compliance. Defendants' position was that compliance with the historic preservation statutes was not necessary until approval of the final mining plan and that phased compliance was therefore appropriate.

The district court initially rejected plaintiffs' NEPA arguments, finding that the discussion in the environmental impact statement of archeological and paleontological resources in the project area was adequate for the purposes of the statute. 501 F. Supp. at 672-73.

In proceeding to plaintiffs' historic preservation claims, the court noted that the obligations of NHPA and Executive Order No. 11593 are separate and independent from those mandated by NEPA. Compliance with NEPA does not guarantee that there has been compliance with NHPA or Executive Order No. 11593. *Id.* at 674.

The district court rejected plaintiffs' timing argument, reasoning that to require compliance with the complete process mandated by Section 106 before approval of the lease would be wasteful and unreasonable, since there would be no assurance that the lease would ever be issued. Rather, the court held that, although under the Council's regulations the term "undertaking" includes mining projects entered into pursuant to a federally approved lease, the "license" that triggered Section 106 was the approval of the mining plan, not the lease approval. *Id.* at 675-76.

Second, the court approved the MOA, which provided for compliance with Section 106 in stages. The Council's regulations recognized that some projects require ongoing or stage-by stage compliance with NHPA. *Id.* at 676. Because Congress had the opportunity to review the Council's interpretation of Section 106 when it amended NHPA in 1976 and chose not to change it, the court deferred to the Council and held that the Council's interpretation did not violate NHPA. *Id.* at 678.

Third, the court dismissed plaintiffs' claims that Interior had violated Executive Order No. 11593 because it did not evaluate for National Register eligibility all archeological sites on the leasehold prior to the deadline established in the Executive Order. The court found that the Executive Order was not judicially enforceable because it did not have the force and effect of law, since neither NHPA nor any other law directed the President to issue the order. Therefore, the Executive Order did not create a private cause of action. Rather, the Executive Order was a "managerial tool" for the benefit of the executive branch. *Id.* at 678-80.

Fourth, the court held that plaintiffs had no cause of action under HADPA. While NHPA is a procedural tool whose function culminates during the planning stage and terminates upon commencement of construction, HADPA is a substantive law whose function is initiated by the beginning of construction on a project and runs coterminous with construction. Until "construction"‹in this case, mining‹began, the statute did not apply. *Id.* at 680.

The Court of Appeals for the Tenth Circuit affirmed the district court's denial of injunctive relief. Although the Department of the Interior had entered into the MOA before conducting surveys and designating sites under the National Register criteria, and so technically had failed to comply with the timing requirements of Section 800.4(a)(4) of the Council's regulations, this technicality had no substantive effect on the purpose of NHPA‹the protection and preservation of historic sites. The Council and the other parties participating in the MOA had made a good faith effort to comply with NHPA. 664 F.2d at 226-27.

The appellate court also affirmed the district court's determination that the "Federal action" was approval of the mining plan, not approval of the lease, because no mining operations could have occurred and no historic sites could have been affected until the mining plan had been approved. *Id.* at 228.

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Case 134

National Trust for Historic Preservation v. Blanck, Civ. Action No. 94-1091 (PLF) (D.D.C. Sep. 13, 1996).

The National Trust for Historic Preservation and Save Our Seminary at Forest Glen, Maryland, sought declaratory and injunctive relief based on a demolition by neglect theory to compel the Army to preserve the National Park Seminary Historic District, which was listed in the National Register of Historic Places in 1972. Plaintiffs subsequently filed a motion for a preliminary injunction to order the Army to conduct emergency repairs on historic buildings pending completion of the litigation.

Over the years, the two dozen buildings and structures in the historic district deteriorated and became significantly damaged due to lack of maintenance. The Army considered demolishing the buildings and developed several master plans for the area that proposed demolition; however, those plans were not carried out. Years later, the Army considered excessing the historic district in light of its continued deterioration and lack of use. As the result of the decision to excess the property, in 1991, the Army initiated Section 106 consultation with the Advisory Council on Historic Preservation and the State Historic Preservation Officer (SHPO).

The district court addressed in detail the question of the appropriate standard of review of the Army's actions under the National Historic Preservation Act (NHPA). Defendants argued that the court should apply the arbitrary and capricious standard of review under the Administrative Procedure Act (APA). Slip op. at 11. Plaintiffs asserted that NHPA creates an implied private right of action through the attorneys' fees provision in Section 305 of NHPA. Such a right of action could "trump the deferential standard of review provided by the APA." *Id*. at 12. The court acknowledged that a number of other cases have held NHPA does create an implied private right of action but, even where such a right was found, the courts applied a deferential standard like that of APA. *See id*.

In determining whether NHPA establishes a private right of action, the court acknowledged that the existence of an attorneys' fees provision is evidence of an intent to create a private right of action, although it is not dispositive. *Id*. at 13. Nonetheless, the district court decided that Congress did not intend to create a private right of action under NHPA. The court reasoned that a private right of action would not provide any more relief to plaintiffs than a suit brought under APA because, like APA, NHPA does not provide for attorneys' fees but only for enforcement of agency compliance. Because APA does not provide for attorneys' fees, the court interpreted the legislative history of Section 305 of NHPA as providing for attorneys' fees for actions brought under APA but not creating a different standard of review. *Id.* at 14. Although the court reviewed the Army's actions under the arbitrary and capricious standard of APA based on the administrative record created by the agency, the court did allow plaintiffs to supplement the administrative record. *Id*. at 16 n.10.

Addressing the merits of the case in light of Section 106, plaintiffs argued that the Army made an affirmative decision not to excess the historic district in 1984 and that such a decision was an undertaking under Section 106. *Id*. at 25. Accordingly, the Army's failure to initiate consultation with the Council and the Maryland SHPO prior to that decision in 1984 was a violation of Section 106. *Id.* The court rejected the Army's argument that there was no undertaking until 1991 when the Army affirmatively decided to excess the property. *Id*. at 22. The court acknowledged that an agency's failure to act, without more, is not an undertaking. *Id*. at 23. However, if as in this case a "considered affirmative decision" not to act has "serious and long-term consequences" for the historic properties, then Section 106 is implicated. *Id*. at 25.

With regard to Section 110, plaintiffs argued that the Army violated Section 110(a)(1) of NHPA which requires that Federal agencies assume responsibility, consistent with the mission of the agency, for the preservation of historic properties owned or controlled by the agency. Specifically, plaintiffs asserted that the Army's failure to prevent decay and deterioration of the historic district violated Section 110, and that Section 110 creates substantive responsibilities.

Slip op. at 19. Defendants argued that Section 110 is merely a procedural provision and does not require that agencies preserve historic properties, but merely that they consider the effect of their actions on historic properties. *Id*.

The court interpreted Section 110 as "an elucidation and extension of the Section 106 process but not its replacement by new and independent substantive obligations of a different kind." *Id*. at 27 (citing *Lee v. Thornburgh*, 877 F.2d 1053, 1057 (D.C. Cir. 1989)), the court observed that Congress did not intend to change the preservation responsibilities of Federal agencies when Section 110 was added to NHPA in 1980. *Id*. at 30. The court also interpreted the Section 110 guidelines issued by the Secretary of the Interior as requiring Federal agencies merely to "consider" ways to use historic properties and to integrate them into agency programs, but not as instructing agencies that they "have an affirmative obligation to spend money to preserve historic buildings." *Id*. at 31.

The court also examined the Army's compliance with its own regulations, which require the preparation of a historic preservation plan as the primary mechanism for compliance with Section 110 of NHPA. Plaintiffs alleged that the Army violated its own regulations by allowing the historic district to deteriorate and by failing to ratify and implement a historic preservation plan, which had been drafted by a consultant in 1992. The Army countered that it had complied with its regulations and Section 110 by developing the cultural resource management plan in 1992. The court agreed with defendants and determined that the cultural resource management plan served as the historic preservation plan for the historic district. *Id*. at 32. The court found that since the adoption of the plan in 1992, the Army was in compliance with its own regulations and Section 110, particularly in light of the substantial sums of money the Army spent on repairs and maintenance (even though the amount spent did not prevent significant deterioration) and its efforts to obtain additional funding to carry out the plan. *Id*. at 33-34. However, from 1984, when the Army promulgated its regulations, to 1992, when the cultural resource management plan was developed, the court found that the Army had violated Section 110 and its own regulations. *Id*. at 35. The court also noted that, because NHPA does not delegate to the Army any interpretive or enforcement authority, the Army's own interpretation of NHPA is not entitled to any particular deference by the court. *Id*. at 32 n. 15.

Despite the finding that the Army violated Section 106 and Section 110 and that "the Army's noncompliance has caused real harm," the court did not order the Army to repair the buildings. *Id*. at 36. The court viewed the requirements of Section 110 as limited and did not view Section 110 as adding substantive obligations on a Federal agency. *Id*. According to the court, when Section 110 was added in 1980, it "was not intended to expand the preservationist responsibilities of federal agencies beyond what the NHPA already required." *Id*. at 37. The court determined that Section 110 did not require the Army to undertake preservation beyond the requirements of Section 106 and its own historic preservation plan. *Id.*

Finding that the Army's expenditure of nearly two million dollars on repairs since 1992 was "not insignificant," the court concluded that the Army had followed the requirements of Section 110 of NHPA, its implementing guidelines and Army regulations. The court emphasized, however, that "merely because a statutory requirement is described as 'procedural' does not render it any less meaningful or mandatory." *Id*. at 38. The court recognized the value of the consultative process itself and stressed that its con clusion was not to be "misunderstood as somehow diminishing the Army's obligations under the NHPA or excusing its derelictions over the years . . . ." *Id*.

Accordingly, the court denied plaintiffs' motions for a preliminary injunction and summary judgment and granted defendant's summary judgment motion.

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Case 130

National Trust for Historic Preservation v. Department of State, 834 F. Supp. 443 (D. D.C.), *recons. denied*, 834 F. Supp. 453 (D.D.C. 1993), *aff'd in part, rev'd in part sub nom. Sheridan Kalorama Historical Association v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995).

The Republic of Turkey proposed to demolish and expand its Washington, D.C., chancery building located in two overlapping historic districts. Turkey submitted an application to the Department of State requesting permission to demolish the existing structure and build a larger one. In accordance with the Foreign Missions Act, the application went first to the State Department's Director of the Office of Foreign Missions. The Director had 60 days to veto or limit the proposal; no veto was issued. The proposal was next reviewed by the District of Columbia Foreign Missions Board of Zoning Adjustment, which rejected the proposal because of the excessive size of the new structure. Turkey resubmitted a down-sized plan for the new chancery. Once again, the Director of Foreign Missions declined to exercise his veto power and forwarded the matter to the Board of Zoning Adjustment. This time, the Board granted permission to proceed with chancery expansion plans. The National Trust for Historic Preservation and two citizens' groups challenged the Board of Zoning Adjustment's approval.

Plaintiffs alleged that the State Department and the Board of Zoning Adjustment failed to comply with the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and the Foreign Missions Act. Plaintiffs also alleged that the board was without jurisdiction to consider chancery requests involving demolition and expansion. Defendants filed a motion to dismiss the case on the grounds that the Foreign Missions Act preempted NHPA and NEPA. Even if NHPA and NEPA were not preempted, according to defendants, they were inapplicable to the present case.

As a preliminary matter, the court found it had jurisdiction to review the Director of Foreign Missions' decision to not exercise his veto power because the court was not persuaded that Congress intended to insulate decisions made under the Foreign Missions Act from judicial review.

With respect to the NEPA claim, the court concurred with the D.C. Circuit's finding in *District of Columbia v. Schramm*, 631 F.2d 854, 862 (D.C. Cir. 1980), that the Federal agency's decision not to exercise its veto power could not be "classified as 'Federal action,' much less a 'major Federal action'" under NEPA. 834 F. Supp. at 448. According to the district court, the "failure to veto complained of is not the functional equivalent of issuing a permit." *Id.* at 449.

In addressing the NHPA claim, the court applied similar reasoning. In light of the new definition of "undertaking" in the 1992 amendments to the NHPA, the court observed that the obligation to consult with the Advisory Council is triggered in several situations: (1) when an agency has the authority to issue a license; (2) when an action is carried out on behalf of a Federal agency; (3) when an action is administered by a State or local entity pursuant to a delegation or approval by a Federal agency; and (4) when an agency approves funds for a Federal or federally assisted project. *Id.* at 449-50. The court framed the question of NHPA applicability as turning on whether the Director's decision not to veto the project constituted a licensing or, alternatively, whether the Board of Zoning Adjustment's decision was pursuant to a delegation by the State Department. *Id*. at 450.

In addressing the question of whether a failure to veto a project constituted an undertaking, the court applied a technical interpretation of the term "license" and determined that the State Department's action was not tantamount to a license. The State Department did not give written permission to Turkey nor was its permission a prerequisite to the Board's consideration of the application. The court's narrow interpretation of a "license" is contrary to the District of Columbia district court precedent of *McMillan Park Community v. National Capital Planning Commission*, 759 F. Supp. 908 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992). *Id*.

The court also addressed plaintiffs' argument that the Board of Zoning Adjustment's permitting decision was pursuant

to a delegation by the State Department and, thus, within the definition of an undertaking under the 1992 amendments to NHPA. The district court described the 1992 amendments as a codification of the decision in *Indiana Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385 (D.D.C. 1991). However, the court distinguished the present case from *Indiana Coal Council*, observing that, unlike *Indiana Coal Council*, the State Department did not maintain an oversight role and the zoning permit decisions were the sole responsibility of the Board of Zoning Adjustment. Moreover, the court reasoned that the Foreign Missions Act placed the authority to issue permits regarding location or expansion of chanceries directly in the Board's hands.

Plaintiffs also alleged a violation of Executive Order 11593, which requires Federal agencies to assure that Federal plans contribute to the preservation of non-federally owned sites. When properties listed in the National Register of Historic Places will be substantially altered or demolished due to Federal action, Federal agencies must ensure that those properties are recorded and that the records are deposited in the Library of Congress. The court rejected this argument because it declined to find an implied cause of action under the Executive Order, although it acknowledged some courts had. *Id*. at 451.

The court addressed plaintiffs' argument that defendants violated the Foreign Missions Act. The court rejected plaintiffs' argument that the Board of Zoning Adjustment lacked jurisdiction to consider an application to demolish the chancery. The legislative history, the language of the Foreign Missions Act in its entirety and the plain language of Section 4306 supported the finding that the Board had jurisdiction over the demolition of properties.

The court found in favor of plaintiffs on the question of whether in granting Turkey's permit application, the Board of Zoning Adjustment failed to comply with the requirements of the Foreign Missions Act. According to Section 4306(d), the Board must consider historic preservation and "substantially comply" with "District of Columbia and Federal regulations governing historic preservation." 22 U.S.C. § 4306(d). The court found that demolition of the chancery would alter the character of the historic districts where it was situated and, thus, substantial compliance with NHPA and the D.C. Historic Landmark and Historic District Protection Act was required.

The court directed defendants to refer the matter to the Advisory Council on Historic Preservation and the District of Columbia Historic Review Board for expedited review. Although the court granted summary judgment for plaintiffs on the basis that defendants failed to comply substantially with NHPA, the court ordered a trial on the question of substantial compliance with local historic preservation laws as the Foreign Missions Act required.

In a later proceeding, the court addressed the issue of compliance with local preservation laws, explaining that "substantial compliance" necessitates compliance with the spirit of the law, not strict compliance. 834 F. Supp. at 455. The court interpreted the local preservation law as requiring solicitation of the views of the mayor's agent, but found that the Board of Zoning Adjustment, not the mayor's agent, had authority to make the ultimate permitting decision. *Id.* The district court held that the Board of Zoning Adjustment had substantially complied with local preservation laws. However, the court held that the Board of Zoning Adjustment had failed to substantially comply with NHPA, as required by the Foreign Missions Act.

Plaintiffs appealed the district court decision on the undertaking issue, and defendants cross-appealed on the issue of compliance with the Foreign Missions Act. The D.C. Circuit Court of Appeals affirmed the district court's holding. The court found that although the State Department's failure to disapprove Turkey's proposal was a prerequisite to initiation of the project, it was not in itself an undertaking as defined by NHPA. 49 F.3d at 754.

The court then examined whether the project in itself was an undertaking. In so doing, the court interpreted the 1992 amendments as expanding the definition of undertaking to include those projects requiring Federal approval or permits, as well as those that are federally funded or licensed.

The court did note that "upon a first reading, the amended definition seems actually to confine the notion of an 'undertaking' to a project (etc.) 'funded in whole or in part under the direct or indirect jurisdiction of a federal agency,' and thus by omission to exclude a federally licensed project from the coverage by the statute. That reading of the definition, however, would deprive the references to licensing in §106 of any practical effect." *Id* at 755.

Without deciding the issue of whether the project itself constituted an undertaking, the court opined that Section 106

did not apply because the Secretary of State had no authority to license the project. *Id.* Contrary to the Council's interpretation of the statute, the court reasoned that once a project fell within the definition of an undertaking, the agency must determine whether the project is federally funded or federally licensed. *Id.* Because no funding was involved, the court focused its discussion on whether the State Department licensed the project by failing to disapprove it. The court of appeals observed that circuit courts were "cautious in extending the reach of §106 beyond the grasp of its terms" and cited several cases where courts declined to find an undertaking. *Id.* at 756. Under the facts of this case, where the State Department's actions were highly discretionary and the Foreign Missions Act was intended to ensure expeditious process, the court noted it was particularly inappropriate to broadly interpret the language of Section 106. *Id.* at 756-57. The appellate court thus affirmed the district court's holding that the "inaction" of the State Department was not subject to Section 106 review.

Plaintiffs also appealed the district court's determination that the Board of Zoning Adjustment had jurisdiction over the proposal, but the court of appeals upheld the district court decision and concluded that the Foreign Missions Act gave the Board exclusive jurisdiction over the location, replacement, or expansion of a chancery.

Finally, the appellate court addressed the matter of the Board's adherence to the Foreign Missions Act provisions requiring substantial compliance with local and Federal historic preservation regulations.

The court of appeals affirmed the district court, holding that the Board of Zoning Adjustment had substantially complied with local preservation law by submitting the proposal to the historic preservation review board and the mayor's agent, even though the board approved the proposal without the comments of the mayor's agent.

With regard to substantial compliance with Federal historic preservation law, the court of appeals reversed the district court's finding that the Board should have referred the proposal to the Council for review and comment. Specifically, the court determined that the Board of Zoning Adjustment substantially complied by considering the comments of the local historic preservation review board. The court found it inappropriate to apply the Section 106 process to a case referred by a local board rather than a Federal agency. *See id.* at 760.

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Case 128

***National Trust for Historic Preservation v. Federal Deposit Insurance Corporation*, No. 93 0904 (D.D.C. May 7, 1993), *aff'd*, 995 F.2d 238 (D.C. Cir.), *vacated*, 5 F.3d 567 (D.C. Cir. 1993), *reinstated in part*, 21 F.3d 469 (D.C. Cir.), *cert. denied*, 115 S. Ct. 683 (1994).**

The National Trust for Historic Preservation and other preservation organizations sought to prevent the Federal Deposit Insurance Corporation (FDIC) from completing the sale and demolition of the Dallas, Texas, headquarters of the Dr. Pepper company, a 1948 Art Moderne building eligible for listing in the National Register of Historic Places. FDIC had obtained title to the building through the liquidation of a failed bank and entered into a contract to sell the historic building to a corporation that planned to demolish it.

Plaintiffs applied for a temporary restraining order to prevent demolition prior to the court's ruling on their allegations that FDIC could not lawfully complete the sale without complying with the National Historic Preservation Act (NHPA). FDIC argued that when it merely acts as an asset liquidator it is not a Federal agency and, therefore, is not obligated to comply with NHPA. The district court found plaintiffs met the burden of showing substantial likelihood of success on the merits, irreparable injury, absence of substantial harm to other parties if the injunction were granted, and a benefit to the public. In particular, the district court found a strong showing of irreparable harm and noted that in the D.C. Circuit where such a finding is made, plaintiff need only demonstrate a likelihood of success on the merits. Slip op. at 6. The district court granted plaintiffs' motion for a temporary restraining order and set a hearing date for one week later to hear the motion for a preliminary injunction.

On the motion for a preliminary injunction, under a different judge, the district court denied plaintiffs' motion and dismissed the case for lack of jurisdiction in a conclusory order. In dismissing the case, the court relied on the Federal Deposit Insurance Act, which provides that "no court may take any action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or receiver." 12 U.S.C. § 1821(j). The district court determined that FDIC was acting as a receiver and that an injunction against the sale would restrain it from exercising its powers, thus violating Section 1821(j) of the Federal Deposit Insurance Act.

Plaintiffs brought an emergency motion for a stay pending appeal, but the court of appeals denied the application and affirmed the district court's dismissal of the case. The appellate court agreed with the district court's interpretation of Section 1821(j). Rejecting the National Trust's argument that Section 1821(j) was inapplicable to FDIC in this case because it was acting in its corporate capacity rather than as a receiver, the court found that FDIC acquired and disposed of the Dr. Pepper building pursuant to its powers as a receiver, as described in Section 1823(d)(3)(A), and, therefore, had the benefit of immunity from judicial restraint under Section 1821(j). 995 F.2d at 240.

The National Trust argued that Section 1821(j)'s limitation on judicial review applies only to matters subject to the administrative claims procedures set forth in Section 1821(d), which do not provide a remedy for failure to comply with the NHPA. The court disagreed, reasoning that nothing in the text of Section 1821(j) so limited its application and, further, that the exclusivity of the administrative claims procedures stemmed from another section, Section 1821(d)(13)(D). The court further explained that plaintiffs' interpretation rendered Section 1821(j) redundant and neglected the language of Section 1821(j) which broadly shielded FDIC's exercise of its powers and functions. *Id.* Because the court found that FDIC was acting within its statutory powers and functions when liquidating the assets of the failed bank, the court found that Section 1821(j) barred suit.

Circuit Judge Patricia Wald issued a strong dissent from the appellate court decision, primarily based on a finding that it was inappropriate to decide the case without the benefit of full briefing and oral argument. Section 1821(j) should be read in the context of the statutory scheme and legislative history, the judge opined, as the United States Supreme Court did in *South Carolina v. Regan*, 465 U.S. 367 (1984), to determine the scope of the preclusion of judicial intervention. 995 F.2d at 241. Judge Wald was dissatisfied with the court of appeals' treatment of the *Regan* precedent

in a mere footnote in the opinion, finding it deserved greater attention. Most importantly, the judge was concerned about the broad implications of the case which effectively insulated FDIC from judicial intervention even if it violated Federal laws that could result in grave harm.

The National Trust petitioned for a rehearing. The court of appeals granted it and vacated the May 28, 1993, opinion and order. On rehearing, the court considered the briefs and oral arguments of the parties and reinstated the May 28 opinion, except for the footnote regarding the *Regan* case. Like the earlier opinion, this decision explained that FDIC had acquired the Dr. Pepper building pursuant to Section 1823 of the Federal Deposit Insurance Act and, thus, enjoyed immunity from suit in accordance with Section 1821. The appellate court distinguished and disagreed with a Fifth Circuit opinion, *Sierra Club, Lone Star Chapter v. Federal Deposit Ins. Corp.*, 992 F.2d 545 (5th Cir. 1993), which allowed an injunction against FDIC for failure to comply with NEPA when disposing of environmentally sensitive lands. Further, in a controlling concurring opinion, Circuit Judge Wald examined the legislative history and statutory scheme and rejected plaintiffs' argument that Section 1821(j) barred only actions brought by parties who have access to an alternative remedy against FDIC. 21 F.3d at 472. The court did note that an aggrieved plaintiff could bring a suit for damages or seek administrative redress after the fact though the Section 1821(d) monetary claims procedure.

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Case 82

National Trust for Historic Preservation v. United States Army Corps of Engineers, 552 F. Supp. 784 (S.D. Ohio 1982), *fees awarded*, 570 F. Supp. 465 (S.D. Ohio 1983).

Plaintiffs sought to enjoin the proposed construction of a barge-loading facility to be built near the historic Anderson Ferry on the Ohio River at Cincinnati, Ohio. They alleged that the Army Corps of Engineers had issued a permit to the landowner in violation of Section 106 of the National Historic Preservation Act (NHPA).

The landowner first applied to the Corps in 1980 for a permit to build and maintain the facility. Although the Corps knew that the ferry was under consideration for inclusion in the National Register of Historic Places and the Corps had been requested by the State Historic Preservation Officer (SHPO) to comply with Section 106, the Corps waited until September 1981 to approach the Advisory Council on Historic Preservation as required by the Council's regulations implementing Section 106 of NHPA.

At that time, the Corps provided the Council with a preliminary case report stating that the Council's criteria of adverse effect were applicable. The Corps requested the Council's comments and thus initiated the Section 106 consultation process. Shortly after, the Council conducted an onsite inspection.

During this time, the Corps prepared several documents under other authorities in which it stated that the barge permit would have no adverse effect on the ferry, although the Corps did not otherwise notify the Council of any change in its determination of effect. The Council then prepared a proposed Memorandum of Agreement (MOA).

Before the Section 106 process was finished, the Corps issued the permit without notifying the Council and refused to rescind it so that the Council's process could be completed. The lawsuit resulted, and during its pendency the parties reopened the consultation but were unable to agree on the terms of an MOA. Consequently, the matter was heard at a meeting of the full Council. After hearing testimony, the Council concluded that by issuing the permit, the Corps had foreclosed the Council's opportunity to comment. The Council then declined to comment until the Corps withdrew the permit.

In considering cross-motions for summary judgment, the court found the Corps to be in violation of NHPA. The court first rejected the Corps' argument that the preliminary case report constituted a determination of no adverse effect because the report had concluded that the adverse effect on the ferry would be minimal. The Council's regulations provide for submission of the preliminary case report only in instances of adverse effect, and the Corps' report followed the format required by the regulations. Moreover, Section 106 consultation is required if there is an adverse effect, however minimal. 552 F. Supp. at 789-90.

Second, the court found that the fact that the Corps had provided the Council with documents generated under other laws stating that the permit would have no adverse effect was not sufficient notice to the Council that the Corps had reversed its position and made a determination of no adverse effect. *Id.* at 790.

Once the Corps initiated the Section 106 consultation, Section 800.4(e) of the Council's regulations prohibited the Corps from taking any action on the matter until the Council issued its comments. The Corps was in violation of its statutory duty under Section 106 when it issued the permit before the Council had provided its comments. *Id.* at 790. That the Corps waited five months between submitting its preliminary case report and issuing the permit was not the "reasonable opportunity to comment" required by Section 106. The court deferred to the Council's determination that the Corps had foreclosed the Council's opportunity to comment. *Id.* at 791.

The court enjoined the defendants from proceeding with the barge-loading facility or from proceeding with any similar project in the future without full compliance with Section 106 and the Council's regulations. *Id.*

Plaintiffs then sought attorneys' fees under Section 305 of NHPA. The court held that the test for fees under NHPA is not the reasonableness of the losing party's position but rather whether the party seeking the award substantially prevailed. Once a court finds that the party substantially prevailed, it must award reasonable attorneys' fees. 570 F. Supp. at 465.

Finding that plaintiffs had substantially prevailed in the action, the court awarded fees and costs. *Id.* at 474. To determine reasonable attorneys' fees, the court applied the standard that had been used in previous cases brought under the Civil Rights Attorneys' Fees Act. The court must make an award that is adequate to attract competent counsel to cases in which damages may be small or nonexistent but that does not constitute a windfall to the attorneys. *Id.* at 469. When the plaintiff has obtained an "excellent result," the attorney should recover fees for hours spent based on a reasonable rate of compensation for attorneys of similar qualifications. *Id.* at 468. The court may deduct a percentage of the hours claimed if it indicates its reasons for the deduction and may make an upward adjustment when the routine hourly rate would not otherwise be reasonable, particularly in cases of exceptional success. *Id.* at 469.

Section 305 of NHPA allows the award of fees not only for attorneys but also for law clerks, paralegals, and other professionals. Thus, the court allowed fees for the services of a city planner. *Id*. The court also allowed plaintiffs to recover fees for time spent preparing for and participating in the Council's meeting. *Id.* at 470.

The court found that each of the several attorneys representing plaintiffs had provided different strengths, and so each could be compensated. Nevertheless, the court reduced the number of hours claimed because of duplication of effort. *Id.* at 470-71. The court determined a reasonable hourly rate, awarding it to both the private attorneys and the one institutional attorney from the National Trust for Historic Preservation, an organization funded in part by the Federal Government. *Id.* at 471-72.

Next, the court awarded an upward adjustment of 25 percent because the result obtained was excellent and there had been a substantial risk that plaintiffs would not prevail. *Id.* at 473.

Finally, using a reasonableness standard, the court awarded costs for incidental expenses that were necessary in furnishing effective and competent representation and could properly be billed to a fee-paying client. These costs included photocopying, travel, telephone, and paralegal and expert witness expenses. *Id.* at 473-74.

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Case 131

Native Americans for Enola v. United States Forest Service, 832 F. Supp. 297 (D. Or. 1993), *vacated*, 60 F.3d 645 (9th Cir. 1995).

Native Americans for Enola, the Cascade Geographic Society, the Friends of Enola Hill, and Rip Lone Wolf brought suit against the United States Forest Service challenging issuance of a permit that allowed a logging company to use Forest Service roads to haul logs felled on privately owned inholdings. Prior to issuing the permit, the Forest Service had made a finding of "no effect" and notified the Oregon State Historic Preservation Officer (SHPO).

The SHPO responded by asserting that the Forest Service's determination did not meet SHPO standards because the Forest Service failed to consider or survey project areas related to road access. In response, the Forest Service maintained that it had made a reasonable and good faith effort to identify properties in the area of potential effects. Plaintiffs were not satisfied with the Forest Service's actions, contending that the permit was issued without providing the SHPO and the Advisory Council on Historic Preservation an opportunity to comment and without considering and documenting the effect on Enola Hill.

The district court disagreed with plaintiffs, finding that the Forest Service had considered appropriate information regarding Enola Hill and issued the permit in compliance with the requirements of Section 106. This was in spite of the fact that the Council had advised the Forest Service that it should submit the Enola Hill site to the Keeper of the National Register of Historic Places for a determination of eligibility as a traditional cultural property. [Ed. note: The Council ultimately sent information on the question of eligibility to the Keeper.] In finding that the Forest Service decision was not arbitrary and capricious and accorded with procedures required by law, the district court observed that the Forest Service searched diligently for historic properties in the Enola Hill area by having specialists and cultural resource technicians conduct several field inventories.

The court noted that significant inventories conducted in past years showed no physical evidence of traditional cultural sites and, further, that the Forest Service had also reviewed existing historical data and sought comments from interested citizens. 832 F. Supp. at 300.

Finally, the court was apparently impressed by the fact that the Forest Service had assembled a committee comprised of archeologists, an American Indian, a cultural resource technician, and attorneys who found that no traditional cultural properties existed in the area. *Id.*

In finding that the Forest Service had complied with Section 106, the district court noted that the Forest Service had numerous communications with the SHPO. A 1989 Memorandum of Agreement (MOA) with the SHPO, in fact, only required the Forest Service to provide data to the SHPO annually on areas surveyed if no cultural resources were found. The district court thus determined that the Forest Service had fulfilled the consultation requirement of 36 C.F.R. § 800.4(b).

Plaintiffs appealed the district court decision, but the Ninth Circuit held that the action was moot.

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Case 75

Natural Resources Defense Council v. City of New York, 528 F. Supp. 1245 (S.D.N.Y. 1981), *dismissed*, 534 F. Supp. 279 (S.D.N.Y. 1982), *aff'd*, 672 F.2d 292 (2d Cir.), *cert. dismissed*, 456 U.S. 920 (1982).

The city of New York proposed to demolish two theaters‹the Helen Hayes and the Morosco‹to make way for a hotel project funded by a Department of Housing and Urban Development (HUD) urban development action grant. The Helen Hayes Theater had been determined to be eligible for inclusion in the National Register of Historic Places. Therefore the city, acting as the "Federal agency" through operation of the Housing and Community Development Act, requested the comments of the Advisory Council on Historic Preservation, submitted a preliminary case report, and initiated the consultation process as required by Section 106 of the National Historic Preservation Act (NHPA) and the Council's regulations implementing Section 106 of NHPA. The city, the Council, and the New York State Historic Preservation Officer (SHPO) entered into a Memorandum of Agreement (MOA) on the Helen Hayes Theater in 1978. The city also prepared an environmental impact statement (EIS) under the National Environmental Policy Act.

During the pendency of the litigation, the question of the eligibility for the Register of the Morosco Theater and other properties was submitted to the Secretary of the Interior. The litigants agreed that if the Secretary determined that the properties were eligible for the Register, they would not object to an expedited Council review of the project with respect to these properties. When the Secretary determined that the Morosco Theater was eligible, the city sought expedited review by the Council, and as a result the city, the Council, and the State Historic Preservation Officer entered into a second MOA in late 1981, after a consultation that lasted only a few days. During this consultation, the Chairman of the Council received a telephone call from a high-level aide to the President who expressed his support for the project.

Plaintiffs contended that the Helen Hayes Theater could not be demolished until all the stipulations in the MOA had been satisfied. The court rejected this argument, noting that execution of the MOA, together with HUD's preliminary approval of the project, permitted demolition to begin in full accordance with NHPA. 528 F. Supp. at 1249.

Second, the court rejected plaintiffs' claims that defendants violated NHPA by failing to request the Secretary of the Interior to determine the eligibility of the entire theater district and thereby failing to seek Council comment on the district as a whole. The court held that no violation occurred because the city and the SHPO had made a good faith decision that no grounds existed for consideration of the eligibility of the district, a decision in accordance with the Council's regulations at 36 C.F.R. § 800.4(a)(3). *Id.*; 672 F.2d at 299.

Third, plaintiffs contended that the expedited Council review of the Morosco Theater violated the Council's regulations because of the haste in which it was conducted, that a provision in the MOA requiring the city to consider further alternatives was illegal, and that the entire process was arbitrary and capricious. The court rejected these arguments because the litigants had agreed to expedited review, the Council had followed all relevant procedures in its regulations, and the Council had considered all the relevant information. 528 F. Supp. at 1252-53; 672 F.2d at 298.

Next, plaintiffs claimed that a supplemental EIS was required because the Morosco Theater had been determined eligible after the city had issued the final EIS. The court rejected this claim as well, noting that a supplemental EIS is not necessary when the final EIS is adequate and no new significant information has come to light. The designation of the Morosco as eligible for the National Register did not qualify as significant information mandating the preparation of a supplemental EIS. 528 F. Supp. at 1254; 672 F.2d at 297-98.

The district court granted summary judgment to defendants on all claims but one‹plaintiffs' allegation that the Council had succumbed to undue political pressure in the Morosco Theater consultation process‹although the court rejected this claim in a later opinion. In the second opinion, the court examined the record and found that there did not exist the sort

of threats and extraneous pressure necessary to sustain plaintiffs' claim. 524 F. Supp. at 281. Rather, the evidence showed that the Council had considered the Morosco Theater and reached its decision untainted by White House pressure. 534 F. Supp. at 282-83; 672 F.2d at 299-300.

The Second Circuit affirmed the district court on all counts. 672 F.2d at 292.

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Case 47

Nehring v. Harris, No. 79-C-1182 (N.D. Ill. Apr. 12, 1979), *dismissed*, 605 F.2d 559 (7th Cir. 1979).

Plaintiffs moved to vacate a prior court order dismissing their complaint, arguing in their motion that Section 106 of the National Historic Preservation Act required the Department of Housing and Urban Development (HUD) to consider the impact of a project that was part of the third action year of a HUD financed urban renewal program on the Haish Building, a structure determined to be eligible for the National Register of Historic Places in 1974, and to seek the comments of the Advisory Council on Historic Preservation on the project. The building in question had been demolished, but HUD continued to fund the greater urban renewal program.

The court held that Section 106 did not apply because that part of the project affecting the Haish Building was approved in 1972, prior to the determination of the building's eligibility for the Register. Slip op. at 2. However, the court found that the Council's regulations are not keyed to the decision to approve funding, but are to apply at any time when it is still possible to effect changes in the undertaking to circumvent an adverse impact.

Because HUD had given final approval and funding for the acquisition of the building, demolition had already occurred, and the land had been reused, HUD could do nothing to change the local agencies' plans. That HUD may approve and fund successive years of the same urban renewal program on an ongoing basis does not place HUD in a position to exert such influence. Requiring compliance with the Council's regulations would be inappropriate and nonproductive. *Id.* at 3.

In considering plaintiffs' National Environmental Policy Act (NEPA) claims that an environmental impact statement (EIS) was required for the third action year of the project, the court concluded that an EIS is not automatically required under NEPA just because there may be an impact on property eligible for the National Register. *Id.* at 4.

In this case, because all of HUD's approvals concerning the building were completed before the building was determined eligible, there was no further major Federal action to be taken regarding the building that would require an EIS. *Id.* at 6.

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Case 59

Neighborhood Development Corporation v. Advisory Council on Historic Preservation, 632 F.2d 21 (6th Cir. 1980).

This case presented a challenge to a redevelopment project in Louisville, Kentucky, funded in part by an urban development action grant from the Department of Housing and Urban Development (HUD).

The project, to be conducted by a local redevelopment agency, called for the demolition of several buildings declared to be eligible for inclusion in the National Register of Historic Places, including the Will Sales Building, the Atherton Building, and the Republic Building. Plaintiffs, which were neighborhood organizations, claimed that the Advisory Council on Historic Preservation, HUD, and the city (the grant recipient) had acted in bad faith in complying with the National Historic Preservation Act and had failed to comply with the National Environmental Policy Act. Relief on the original complaint, which sought relief only for the Will Sales Building, was denied. Plaintiffs then sought to amend the complaint to enjoin demolition of the Atherton and Republic Buildings, not included in the original complaint.

The district court denied plaintiffs' motion to amend and dismissed the case on grounds that plaintiffs lacked standing and had failed to join the owners of the two buildings.

The Sixth Circuit reversed, holding that plaintiffs had shown standing by alleging that their members used the buildings' aesthetic and architectural values. Injury-in-fact is not suffered only by residents of the neighborhoods in which affected historic properties are located or by persons with an economic interest in the properties.

The court held that the district court erred by dismissing plaintiffs' complaint for lack of standing and denying their motion for leave to amend their complaint. 632 F.2d at 23-24. Second, the appellate court held that failure to join the building owners was not a proper reason to deny plaintiffs' motion for leave to amend. *Id.* at 25.

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Case 114

North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992).

Residents in the historic area of Merritt College alleged that the city of Oakland had violated Section 106 of the National Historic Preservation Act (NHPA) through anticipatory demolition by neglect of the historic institution. The city had purchased the college in 1983 with Community Development Block Grant (CDBG) funds from the Department of Housing and Urban Development (HUD), but had done little to develop the property since that time, and had not yet completed the Section 106 review process. The district court rejected the city's motion for summary judgment and judgment on the pleadings and found in favor of plaintiffs.

Addressing preliminary legal questions, the district court found first that plaintiffs met the standing requirement by alleging interest in the college's aesthetic and architectural values and, further, by showing real interest in the matter through involvement in the administrative process. *Id.* at 9. The court also found that NHPA creates an implied private right of action by providing for attorneys' fees and costs to interested persons who prevail in actions to enforce its provisions. *Id.* at 10-11.

The court next addressed defendant's arguments that its actions did not constitute an undertaking within the meaning of Section 106. "The term 'undertaking' should be read very broadly," the court stated, although it also noted that some circuits had adopted the view that the undertaking requirement is "coterminous" with the National Environmental Protection Act's definition of "major Federal actions." *Id* at 13-14. The acquisition of Merritt College with CDBG funds was an undertaking, the court decided, not the mere transfer of title the city alleged. The acquisition had to have been part of a community development program in order to qualify for CDBG funds, the court reasoned. Even if the acquisition were nothing more than a title transfer, Section 106 compliance was still necessary. *Id.* at 14-15.

Because the acquisition of the historic college was an undertaking, the court concluded that plaintiffs had stated a cause of action for "demolition by neglect" in violation of the Council's Section 106 regulations, which provide that "neglect of the property resulting in its deterioration" is an adverse effect. *Id.* at 7 (citing 36 C.F.R. § 800.9(b)(4)); *see also id.* at 16, 25 n. 4. However, the court found that plaintiffs did not state a cause of action for failure to conduct a Section 106 review because, though the review was not complete, the city was currently in the middle of the Section 106 process. *Id.* at 16.

The city of Oakland also argued that it was not obligated to comply with NHPA because Section 106 applies only to Federal agencies. Plaintiffs countered that the city had to comply with Section 106 since HUD had delegated its duties under the Housing and Community Development Act (HCDA) and its implementing regulations. As a preliminary matter, the district court observed that the Council's regulations at 36 C.F.R. § 800.2(b) include as an "agency official" any local government official who has been delegated legal responsibility for compliance with Section 106. Slip op. at 17. Moreover, the court found that HUD's regulations, as authorized by the HCDA, expressly allow grant recipients to assume duties under Section 106. In order to receive funding, in fact, HCDA provides that recipients must certify compliance with HUD regulations, consent to assume the status of a Federal official, and consent to Federal court jurisdiction. CDBG recipients assume these responsibilities upon execution of a grant agreement. *Id.* at 19. Thus, the court determined that the city was the proper defendant and that the court had jurisdiction over it.

As a final argument, the city alleged that its Section 106 obligations ended on the date HUD last approved expenditure of CDBG funds for the college. The district court rejected this argument, finding that HUD had retained continuing authority over the use of CDBG funds, which meant that the undertaking was still an ongoing Federal action. *Id.* at 22. According to the court, HUD still had an opportunity to exercise its authority and demand alteration of the project to ensure the recipient's compliance with NHPA. *Id.* As late as 1991, the court noted, HUD warned the city that it would violate HUD regulations if it spent additional CDBG funds without first complying with Section 106. Prior HUD

approval of CDBG funds did not relieve Oakland of its duties under Section 106.

Accordingly, the court concluded that plaintiffs' complaint properly alleged a cause of action under Section 106 for "demolition by neglect." *Id.* at 16. However, because the city was in the process of complying with Section 106, the court dismissed plaintiffs' claim that the city failed to conduct Section 106 review. *Id*.

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Case 83

***Northwest Indian Cemetery Protective Association v. Peterson*, 552 F. Supp. 951 (N.D. Cal. 1982), *injunction granted*, 565 F. Supp. 586 (N.D. Cal. 1983).**

Plaintiffs challenged the decisions of the United States Forest Service to complete construction of a road from Gasquet to Orleans in California (the "G-O Road") and to adopt a forest management plan that would permit the harvesting of timber in the Blue Creek unit of the Six Rivers National Forest. They alleged violation of the National Historic Preservation Act (NHPA) and other statutes and sought a preliminary injunction to stop the road.

In compliance with the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA, the Forest Service had sought and obtained the comments of the Council on the G-O Road.

The court concluded that plaintiffs had not shown that the Council was denied an opportunity to comment or that the Forest Service had dealt with the Council in bad faith. 552 F. Supp. at 955. The court denied plaintiffs' motion for preliminary injunction.

In a later opinion, the court permanently enjoined construction of the road and timber harvesting until defendants complied with the National Environmental Policy Act and other environmental statutes.

The court, however, again rejected plaintiffs' arguments that defendants had violated NHPA. That the Forest Service had modified its timber management plan was not sufficient change as to require additional comment by the Council. 565 F. Supp. at 604.

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Case 122

Pacific Gas Transmission Company v. Richardson's Recreational Ranch, 773 F. Supp. 246 (D. Or. 1991), *aff'd*, 9 F.3d 1394 (9th Cir. 1993).

Pacific Gas Transmission Company (PGT) brought an action for declaratory and injunctive relief to obtain access to private property pursuant to a right-of way agreement. PGT, a common carrier of natural gas, had entered into an agreement with the previous owners of a ranch. The agreement gave PGT a right-of-way over the ranch to install and maintain pipelines; it also granted the right to use land adjacent to the right-of-way "as may be reasonably necessary in connection with the installation." 773 F. Supp. at 247. Subsequent owners of the ranch sought to prevent PGT from accessing the property.

In preparing to install the pipeline, PGT sought the requisite Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission (FERC). Before it would issue the certificate, FERC required PGT to conduct an archeological survey and prepare an initial evaluation of resources to meet the requirements of the National Historic Preservation Act (NHPA). *Id.*

The current owners of the ranch denied PGT access to the property, and PGT had to obtain a court order to enable its archeological team to conduct an initial survey. Once that survey was complete, the owners denied access for additional studies. PGT alleged that the right-of-way agreement afforded it the right to conduct activities on adjacent lands "reasonably necessary" to the installation of the pipeline. PGT also argued it had a right to enter the land "by virtue of the privilege to access private lands which flows from the duty imposed by federal law." *Id.*

In response to these arguments, ranch owners asserted that the necessity to access the property for archeological study could not have been contemplated at the time the agreement was signed with the original owners in 1960, since the agreement predated passage of NHPA by six years. The current owners further alleged that private property owners are not subject to NHPA.

The court granted summary judgment in favor of PGT, concluding that the right-of-way agreement authorized PGT to install the pipeline and use adjacent property as was reasonably necessary in connection with the installation. The court determined that compliance with NHPA and other Federal laws was required: "There can be no dispute but that the requirements of the National Historic Preservation Act and other federal laws applicable to the installation of the pipeline must be met." *Id* at 248. Therefore, the court ruled that PGT was entitled to access the private property.

The Ninth Circuit affirmed the district court ruling, finding that PGT's duty to comply with Federal requirements were contemplated by the right-of-way agreement. 9 F.3d at 1396.

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Case 84

Paulina Lake Historic Cabin Owners Association v. United States Department of Agriculture Forest Service, 577 F. Supp. 1188 (D. Or. 1983).

Plaintiffs maintained vacation cabins in a camp on Forest Service land under a special use permit originally issued in 1934. At the time that the original permit expired, the Forest Service began efforts to change the use of the site. Nevertheless, the Forest Service issued a new special use permit allowing plaintiffs to remain in possession of the camp until 1979. Further extensions of the permit were denied, and in 1980 and 1981 the Forest Service requested plaintiffs to remove the structures so that the Government could retake possession of the land. The Forest Service told plaintiffs that as of June 1, 1981, whatever property remained would become Government property. In April 1981, under prodding by the plaintiffs, the Forest Service applied to the Keeper of the National Register of Historic Places for a determination of the eligibility of the entire camp for the Register. The Keeper decided that the camp was not eligible, and the Forest Service again requested plaintiffs to remove the structures.

Plaintiffs then filed this lawsuit. The parties stipulated that the plaintiffs would apply to have the structures placed on the Register and, until then, the Forest Service would protect the properties. On July 7, 1983, after several more attempts to have plaintiffs remove their property from the campsite, the Forest Service nailed notices to each of the structures proclaiming them to be the property of the United States. On July 14, the cabins were listed in the Register.

Plaintiffs claimed that Section 106 of the National Historic Preservation Act (NHPA) and the Forest Service's past forbearance from eviction gave rise to an implied license for plaintiffs to continue to use the camp until the Forest Service complied with NHPA. The court disagreed. Citing several cases in which courts had examined the effect of NHPA on the Government's right to condemn property, the court concluded that the transfer or reclamation of title was an environmentally neutral action. Therefore, the Forest Service's action asserting ownership of the structures was not an NHPA "undertaking" under the definition established by Section 800.2(c) of the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA. 577 F. Supp. at 1193. The court also noted that the final decision whether to raze the structures rested not with the Keeper of the Register but with the Forest Service. *Id.* at 1192 n. 1.

Plaintiffs also argued that they were entitled to attorneys' fees under Section 305 of NHPA because the parties to the suit had stipulated that the site would not have been included in the Register or the structures preserved but for the plaintiffs' efforts. Notwithstanding its decision that plaintiffs were not entitled to continued use and occupancy of the structures, the court concluded that plaintiffs' efforts were the moving force behind inclusion of the cabins in the Register and that "in that sense they are the prevailing party." The court allowed plaintiffs to file their petition for attorneys' fees. *Id.* at 1196.

The court denied plaintiffs' motion for an injunction preventing the Forest Service from moving or destroying the cabins before complying with NHPA because the Forest Service had stipulated that it would so comply. Id.

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Case 15

***Pennsylvania v. Morton*, 381 F. Supp. 293 (D.D.C. 1974).**

The Commonwealth of Pennsylvania brought suit against the Secretary of the Interior and private defendants to stop the private construction of a tower on private land adjacent to the Gettysburg National Military Park, administered by the National Park Service (NPS) of the Department of the Interior. When the private defendants proposed to construct the tower, NPS negotiated with them to minimize the effect that the tower would have on the park. As a result, NPS and the private parties entered into an Agreement and Land Exchange under which the private parties would relocate the tower to a site with less adverse impact on the park and the Federal Government would grant a 200-foot right-of-way to the private parties.

The Commonwealth initially instituted an action in State court to enjoin construction of the tower. The State trial court concluded that the tower would not irreparably damage the historic values of the park and refused to enjoin the project. The Commonwealth filed exceptions to the judge's decision, arguing that the agreement violated Federal law because it had not been reviewed by the Advisory Council on Historic Preservation as required by Section 106 of the National Historic Preservation Act (NHPA).

As the case progressed through the State courts, the Department of the Interior submitted the already executed agreement to the Council for review. The Council agreed that the tower would have an adverse effect on the park and recommended that Interior attempt to block its construction. Following this recommendation, Interior unsuccessfully attempted to stop construction. The State court recognized the Council's comments and Interior's efforts but still refused to enjoin the project.

Plaintiff then instituted suit in the Federal court alleging that construction of the tower would harm the historic park, that NPS had violated Section 106 by executing the agreement without seeking the Council's comments, and that the agreement was a major Federal action requiring an environmental impact statement under the National Environmental Policy Act (NEPA).

The Federal district court rejected plaintiff's first claim on the ground of *res judicata*, holding that the question of the tower's impact on the park had been fully litigated in the State courts. 381 F. Supp. at 297. The court also rejected plaintiff's argument that NPS violated Section 106. Although NPS did not refer the agreement to the Council until after its execution, the agency did seek, obtain, and attempt to follow the Council's comments. The court held that NPS had therefore substantially complied with Section 106. If NPS deviated from the Council's recommendation, it had the discretion to do so. *Id.* at 299.

Finally, after finding that the Commonwealth had standing to represent the interests of its citizens in the use of land within its borders, the court remanded the matter to the agency for further consideration of the environmental issues under NEPA. *Id.* at 300.

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Case 105

***People for Responsible Omaha Urban Development v. Interstate Commerce Commission*, CV88-0 247 (D. Neb. Feb. 14, 1989), *aff'd*, No. 89-1342 NE (8th Cir. Sept. 14, 1989), 889 F.2d 1092 (mem.), *cert. denied*, 495 U.S. 957 (1990).**

People for Responsible Omaha Urban Development (PROUD), together with the National Trust for Historic Preservation as an intervening plaintiff, sued the Interstate Commerce Commission, the National Park Service (NPS) and the Army Corps of Engineers, to enjoin demolition of an entire historic warehouse district known as Jobbers Canyon, which was listed in the National Register of Historic Places. The area was to be converted into a man-made lake with future commercial sites, as part of an adjacent corporate development.

PROUD alleged that the Federal agencies failed to comply with the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). At the outset of the litigation in May 1988, the district court denied plaintiffs' request for a preliminary injunction, so demolition proceeded over the course of the following year as the litigation went forward. The district court later ruled in favor of defendants on the merits, basing its ruling on the findings and recommendations of a magistrate. The court of appeals affirmed the district court decision in a brief opinion.

The case focused on whether there was sufficient Federal involvement in the project to trigger NEPA and NHPA. With regard to ICC, PROUD alleged that since ICC approval was required to change routing of rail lines and abandon a portion of the rail line, compliance with NEPA and NHPA was necessary.

The district court, based on the magistrate's findings, rejected that argument after concluding that the type of abandonment involved in this case and the change in use on the other portion of tracks did not require ICC approval.

Plaintiffs also alleged that the Corps had approval authority over plans to realign storm sewers and other structures that interfaced with a flood wall in the project area. The Corps argued that it only had authority within the levee right-of-way.

The district court found that although the Corps had the right to review plans, the Corps did not have control or responsibility over the project because it lacked enforcement power. Thus, the district court held that the Corps was not involved in the project in any meaningful way.

Even if the Corps and ICC were involved, the district court determined that there was no evidence demonstrating such involvement as to trigger NEPA and NHPA. In so ruling, the district court adopted the reasoning in *Ringsred v. City of Duluth,* 828 F.2d 1305 (8th Cir. 1987) and *Winnebago Tribe v. Ray,* 621 F.2d 269 (8th Cir.), *cert. denied,* 449 U.S. 836 (1980) and determined that in order to assess whether NEPA or NHPA apply, a court should consider whether Federal action is a legal condition precedent to commencement of the project. If Federal action is not a legal condition precedent, but Federal action still exists, the court should consider the degree of discretion exercised by the Federal agency, the existence of Federal funding of the project, and the amount of overall Federal involvement in the otherwise private action.

In its claim against NPS, plaintiffs alleged that the Land and Water Conservation Fund (LWCF) acquisition of land for a park east of Jobbers Canyon triggered a requirement for NPS to approve a "conversion" of the use of the land.

The district court agreed with the magistrate's finding that the use of the federally funded parkland in the corporate campus development was not sufficiently different from the original county park plan to constitute a "conversion" of use, and thus did not require NPS approval.

In a separate opinion, the district court also rejected a title issue raised by plaintiffs, who argued that under Nebraska law the railroad abandonment caused the property to revert to the heirs of turn-of-the-century adjacent landowners along the rail corridor, and that the railroad thus did not have clear title to convey the property.

However, the district court did issue a strong ruling in favor of plaintiffs on standing, which had been challenged by the defendants. The court held that plaintiffs' enjoyment and appreciation of the architecture of Jobbers Canyon was a sufficient basis for standing under the NHPA and NEPA.

Although the court of appeal granted a partial stay of demolition during the appeals at a time when five buildings remained standing in the district, the injunction was later dissolved, and the court of appeals issued a *per curiam* affirmance in a brief opinion. Ultimately, all 24 buildings in the National Register-listed historic district were demolished, and the adjacent corporate campus was completed.

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Case 7

Petterson v. Froehlke, 354 F. Supp. 45 (D. Or. 1972).

Property owners objected to the proposed expansion of the Portland International Airport and construction of a bridge and a segment of highway. The project involved filling part of the Columbia River and removing all or part of three islands. Plaintiffs alleged that the project would affect the Fort Vancouver National Historic Site, located more than 10 miles from the airport, and that the National Historic Preservation Act (NHPA) therefore invalidated a dredge and fill permit that had been issued by the United States Army Corps of Engineers.

The court disagreed and dismissed the complaint, holding that NHPA did not invalidate the Corps' action and that the project's effects on the historic site were too slight to require the Federal agencies to comply with NHPA. 354 F. Supp. at 50.

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Case 31

***Philadelphia Council of Neighborhood Organizations v. Coleman*, 437 F. Supp. 1341 (E.D. Pa. 1977).**

Plaintiffs sought declaratory and injunctive relief to prohibit the Department of Transportation (DOT) from funding a commuter rail tunnel in Philadelphia, Pennsylvania, with a capital assistance grant. The grant contract had been signed in January 1977 after a series of applications and revisions. The project would affect the Reading Terminal and other historic buildings in Philadelphia. DOT had completed an environmental impact statement (EIS) under the National Environmental Policy Act in May 1975 that incorporated a Memorandum of Agreement (MOA) entered into by the Urban Mass Transportation Administration (UMTA) of DOT and the Advisory Council on Historic Preservation under Section 106 of the National Historic Preservation Act (NHPA). The MOA acknowledged that UMTA's plans to mitigate damage to the historic buildings were satisfactory.

The court upheld DOT's compliance with Section 4(f) of the Department of Transportation Act, NHPA, and Executive Order No. 11593, finding that DOT adequately considered the effect of the tunnel on historic buildings and that the agency's actions were not arbitrary, capricious, or an abuse of discretion. 437 F. Supp. at 1361. The court also upheld the agency's EIS. *Id.* at 1366.

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Case 76

Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982).

Plaintiffs alleged that defendants violated the National Historic Preservation Act (NHPA) by deciding to demolish, as part of an urban redevelopment project funded in part by the Department of Housing and Urban Development (HUD), several buildings listed in the National Register of Historic Places. HUD and the local redevelopment agency had entered into loan and capital grant contracts in 1969 and 1971. In 1973, the area was surveyed to determine if any buildings were eligible for listing in the National Register. Seven buildings were placed on the Register in 1974 and one additional building, the Eastman Building, in 1978.

The local agency entered into two Memoranda of Agreement (MOA) with the Advisory Council on Historic Preservation under the Council's regulations implementing Section 106 of NHPA, one in 1974 and one in 1979. In 1979, the local agency converted the funding from urban renewal funds to community development block grant funds by signing a "financial settlement" with HUD and, as the "Federal agency" under the Housing and Community Development Act, prepared an environmental assessment under the National Environmental Policy Act (NEPA). The assessment concluded that the project would have no significant environmental impact.

The Ninth Circuit, in reversing the district court, held first that the suit was not barred by laches even though eight years had passed since the original HUD grant agreement had been signed. During that time, the buildings were placed on the Register and plaintiff had been diligent in making its views known to the agency. 667 F.2d at 854-55.

Second, the court noted that NEPA requires Federal agencies to preserve important historic and cultural aspects of our nation's heritage and that judgments of historic significance made by the Council, "the expert regulatory body concerned with preserving, restoring, and maintaining the historic and cultural environment of the Nation," deserve great weight. *Id.* at 858. Execution of an MOA or other compliance with NHPA does not relieve an agency of the duty to prepare an environmental impact statement under NEPA. *Id.* at 859.

The court recognized the similarities between NEPA and NHPA: both create obligations that are chiefly procedural, both have the goal of generating information about the impact of Federal actions on the environment, and both require that the Federal agency carefully consider the information produced. Nevertheless, each statute mandates separate and distinct procedures, and an agency must comply with both statutes whenever historic buildings are affected. *Id.*

In upholding the local agency's decision not to prepare an environmental impact statement, the court found that the agency's determination regarding the impact on historic buildings was reasonable. The mere fact that the project involved the destruction of buildings listed in the Register did not, standing alone, render unreasonable the decision not to prepare an environmental impact statement. *Id.* at 861. The appellate court did not reach the NHPA issues because they had not been raised on appeal.

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Case 123

***Preservation League v. Lake Placid Land Corporation*, No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993).**

Individuals and historic preservation organizations brought this action against the Federal Deposit Insurance Corporation (FDIC), successor to the Federal Savings and Loan Insurance Corporation (FSLIC), to prevent the demolition of the historic Lake Placid Club. In November 1992, plaintiffs won a temporary restraining order preventing a developer from demolishing the club pending the court's hearing on a preliminary injunction.

In the late 1980s, FSLIC entered into consultation with the Advisory Council on Historic Preservation when it acquired title to the Lake Placid Club from the distressed financial institution that once owned the property. The FSLIC, the New York State Historic Preservation Officer (SHPO) and the Council signed a Memorandum of Agreement (MOA) in 1988 which explained how FSLIC would dispose of the property and preserve its historic character.

Plaintiffs argued that FDIC, as successor to FSLIC, failed to comply with the agreement, which required the owner to preserve portions of the club, and, therefore, violated Section 106. Defendants argued that execution of the MOA completed the Section 106 process and thus terminated Federal involvement with the property. The parties to this dispute also disagreed as to the interpretation of certain portions of the MOA.

First, the court addressed the threshold question of standing. The court found that the individuals had standing to bring this suit but that the organizations did not have standing, since they did not allege injury to members. Second, the court determined that it had subject matter jurisdiction over the dispute even though the dispute arguably resembled a State contract or real property action. The court explained that the Supreme Court allows Federal courts to exercise jurisdiction over claims that involve the construction of Federal law. Because the case hinged on the interpretation of the term "undertaking" in the National Historic Preservation Act (NHPA), the court found that it had subject matter jurisdiction.

Upon interpreting the term undertaking and determining that an undertaking did not exist, the court denied plaintiffs' motion for a preliminary injunction. The court further rejected plaintiffs' arguments that the MOA contemplated continued Federal involvement of the Federal agency.

As support for their argument, plaintiffs pointed to language in the preamble of the agreement which referred to the club's "subsequent redevelopment" as part of the undertaking that was the subject of the MOA. Plaintiffs also relied on language in the agreement that indicated Section 106 consultation could be reinvoked under certain circumstances.

In denying the request for a preliminary injunction, the court followed the decision of *Waterford Citizens' Association v. Reilly*, 970 F.2d 1287 (4th Cir. 1992), concluding that the incorporation of, or reference to, Section 106 procedures in an MOA did not in themselves constitute continuing Federal involvement rising to the level of an undertaking. The court relied on language in the MOA which stated that execution of the MOA and fulfillment of its terms evidenced that the agency had taken into account the effects of the sale. Further, the court pointed to language in the Council's regulations which states that its acceptance of an MOA "concludes the Section 106 process."

The court distinguished the case from *Fill the Pool Community v. Village of Johnson City*, No. 92-CV-762 (N.D.N.Y. Aug. 18, 1982), where the court found that the Federal agency retained jurisdiction over the historic property, noting that in the present case FDIC did not have a veto power over the changes to the historic property and did not expend funds on the property.

Further, the court noted that in *Fill the Pool* the Federal agency involved was the National Park Service which issued a conditional grant giving the agency continuing jurisdiction over the property as part of the agency's mission. By contrast, the mission of FSLIC did not persuade the court that it intended to retain Federal involvement through the MOA. Slip op. at 19. Accordingly, the court did not address the question of whether defendants violated the terms of

the MOA.

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Case 148

Presidio Golf Club v. National Park Service, 155 F.3d 1153 (9th Cir. 1998).

Plaintiff, the private Presidio Golf Club in San Francisco, California, challenged a proposal by defendant, the National Park Service (NPS), to construct a public golf clubhouse near its century-old private clubhouse, which was eligible for listing in the National Register. Presidio asserted that NPS violated the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) by failing to consider that constructing the public clubhouse might lead to neglect and destruction of the historic private facility. NPS then challenged plaintiff's standing to sue under NEPA, NHPA, and the Administrative Procedures Act, and filed for summary judgment.

NPS argued that plaintiff lacked standing for the following reasons: first, that any future injury to Presidio would be a purely speculative economic competitive injury that is not within the zone of interests to be protected by NEPA or NHPA; second, that Presidio lacked standing in its representative capacity based on injury to its club members; and third, that any future injury would be "self-induced," "conjectural and speculative," and not fairly traceable to the actions of defendant. The court found that purely economic interests do not fall within the "zone of interests" to be protected by NEPA or NHPA, noting that on previous occasions it has held that a court would have to find that plaintiff's interests are inconsistent with the purposes of NEPA, and the interests are so inconsistent that it would be unreasonable to assume that Congress intended to allow the suit. It further noted that the "zone of interests" test is not demanding.

After reviewing the facts, the court concluded that retention of the historic clubhouse was consistent with the purposes of NHPA as a "living part of...community life," and that it furthered NHPA's goals to "encourage the...private preservation and utilization of...the Nation's historically built environment." The court found no need to require the participation of individual members in the suit as suggested by NPS, since the interests and claims are undifferentiated among the members and similar to the interests and claims of Presidio. Finally, determining that the projected membership losses could well prove fatal to Presidio and constitute a future injury that is fairly traceable to NPS's alleged procedural violation, the court held that plaintiff had standing.

The court then turned to plaintiff's allegations that NPS violated NEPA and NHPA, noting the guidance from previous case law stating that "an agency's decision should be overturned if it was 'arbitrary, capricious and abuse of discretion, or otherwise not in accordance with the law.'" *Western Radio Services Co. v. Espy,* 79 F.3d 896, 900 (9th Cir.), cert. denied, 117 S.Ct. 80 (1996). It also stated that "review under the arbitrary and capricious standard is narrow and the reviewing court may not substitute its judgment for that of the agency." *Id.*

Although NPS expressed confidence throughout the NEPA process that compliance would end with the preparation and approval of a Finding of No Significant Impact, the court found that the agency's approach to the process was not pre-decisional and was therefore permissible. It also determined that it was neither arbitrary nor capricious for NPS to not take a "fuller account of the remote environmental effects on the historic private clubhouse that might result from the economic impact of competition from the new public clubhouse."

Presidio argued that NPS erred during its NHPA review by failing to consider the golf club as an "interested party" and consulting with it. The court found that all that NPS had to do regarding interested parties during effect assessment was to "consider their views." The court, based on NPS responses to public comments, decided that NPS had indeed considered Presidio's comments. The fact that NPS disagreed with those comments did not present a compliance problem. Although Section 106 of NHPA requires agencies to "consult with…interested persons" as to the resolution of adverse effects, such consultation was unnecessary in this case due to NPS's determination of no adverse effect.

The court ended its decision by holding that the district court did not err when it considered a "litigation affidavit." The

affidavit was prepared to explain NPS's prior analyses of the possibility of using the private clubhouse, and also pointed out the standard developed by the Ninth Circuit in a previous case, which permits an "explanation" of agency decision making to allow for an adequate judicial review.

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Case 132

Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995).

This case addresses the question of what constitutes a "reasonable and good faith effort" to identify and evaluate traditional cultural properties that may be affected by an undertaking. The Pueblo of Sandia and environmental organizations alleged that the United States Forest Service failed to comply with the National Historic Preservation Act (NHPA) when the Forest Service approved a road project and related improvements in the Las Huertas Canyon in the Cibola National Forest without first evaluating the canyon as a traditional cultural property eligible for inclusion in the National Register of Historic Places.

The district court had ruled in favor of the Forest Service, finding that the agency had met the "substantive requirements" of NHPA, even though the agency did "not appear to have taken the requirements of [NHPA] very seriously . . . ." 50 F.3d at 858. The district court was persuaded by the fact that the New Mexico State Historic Preservation Officer (SHPO) had concurred in the Forest Service finding that the canyon sites were not eligible. *Id.*

The court of appeals reversed the district court decision, holding that the Forest Service did not make a reasonable and good faith effort to identify historic properties and, therefore, could not make a proper determination as to whether the area contained traditional cultural properties. In evaluating the Forest Service identification effort, the court noted that officials had mailed form letters to local Indian tribes, including the Sandia Pueblo, and to individual tribal members, requesting maps and detailed information on the location of potential sites, the type and frequency of activities on them, and their historic nature.

The Forest Service also requested this information at meetings with the tribes in which it informed them that properties of traditional cultural or religious significance are eligible for the National Register. The tribes did not provide the Forest Service with the requested information; however, during the environmental impact statement process, they did inform officials that the selected alternative would adversely affect traditional cultural properties and practices in the canyon as a result of increased traffic and visitation.

Moreover, the Governor of the Sandia Pueblo had informed the Forest Service that the canyon was of great religious and cultural significance. The affidavit of a tribal elder and religious leader taken by the regional forester, which listed several religious practices, also alluded to sacred sites.

The court noted that the Forest Service had additional evidence that the canyon contained traditional cultural properties. Minutes of a working group meeting showed that the canyon was used by the Pueblo for ceremonial, religious, and medicinal purposes. Additionally, an anthropologist informed the Forest Service of the tribe's religious and cultural affiliation with the canyon, noting ceremonial paths, sites, and herbs used by the Pueblo.

The court also was persuaded by the fact that the Forest Service should have known that tribes are reluctant to divulge specific information about religious and cultural sites. *National Register Bulletin 38* warns that tribes may not divulge such information. Indeed, the court pointed out that the anthropologist and the tribal members noted the importance of secrecy to the tribes. *Id.* at 860-61.

In assessing what constitutes a reasonable effort to identify traditional cultural properties, the court observed that *Bulletin 38* states that the level of effort depends on the likelihood that properties may exist. The court found that the information before the Forest Service, when considered with the secrecy concerns of the tribes, was enough to constitute a likelihood that traditional cultural properties existed and thus warranted further investigation. *Id.* at 861.

As a final matter the court addressed plaintiffs' allegations that the Forest Service did not act in good faith as required by the Council's regulations when it consulted with the SHPO during the identification of properties. The SHPO had concurred in the Forest Service's original finding of no adverse effect, but later withdrew its concurrence upon finding

that the Forest Service withheld information from the SHPO.

The court observed that "consultation with the SHPO is an integral part of the Section 106 process" and determined that consultation with the SHPO "would be meaningless unless the SHPO has access to available, relevant information." *Id.* at 862. The court interpreted the consultation requirement in the Council's regulations to mean "informed consultation." *Id.*

Because the Forest Service did not provide the affidavits of the anthropologist and the elder leader of the Sandia Pueblo to the SHPO in a timely fashion prior to the SHPO's concurrence and had represented to the SHPO that the Pueblo of Sandia had disclosed no evidence of traditional cultural properties, the court found that the Forest Service did not act in good faith when identifying properties.

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Case 67

Puerto Rico v. Muskie, 507 F. Supp. 1035 (D.P.R.), *injunction vacated sub nom. Marquez-Colon v. Reagan*, 668 F.2d 611 (1st Cir. 1981).

The Commonwealth of Puerto Rico and various citizens challenged the Federal Government's decision to transfer Haitian and Cuban refugees from Florida to an abandoned Department of Defense facility in Puerto Rico known as Fort Allen. The Government had done nothing to comply with the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), Executive Order No. 11593, or the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA prior to beginning construction on the camp to ready it for refugee occupancy, although it had commissioned an archeological survey of the area after construction began.

The district court found that construction of the camp was a major Federal action requiring an environmental impact statement (EIS) under NEPA and preliminarily enjoined the project. 507 F. Supp. at 1026. A few days later, the Refugee Education Assistance Act, Public Law No. 96-422, and Executive Order No. 12246 were signed into law, exempting the activity from the requirement that an EIS be prepared. The court lifted the preliminary injunction's requirement that an EIS be prepared, but continued the injunction on other grounds, including violation of NHPA. *Id.* at 1056.

The court found that Section 106 of NHPA and the Council's regulations required the Federal Government to identify historic properties before beginning construction. The archeological survey done after construction began did not exonerate the Government from this duty. Moreover, the Federal Government did not consult with the State Historic Preservation Officer or conduct a literature search to determine what historic properties were known to be within the area.

The court found that "these requirements go to the heart of NHPA‹for without compliance, an archeological survey may fail to uncover existing cultural resources for the simple reason that the archeologist may not know what he/she is looking for." *Id.* at 1061.

The Federal Government and the Commonwealth of Puerto Rico, one of the plaintiffs, then entered into a consent agreement. Under this agreement, the Commonwealth accepted the Federal Government's archeological report, updated by a literature search, as substantial compliance with NHPA. The Commonwealth also indicated that it knew of no historic sites listed in or eligible for the National Register of Historic Places that would be harmed by the planned use of Fort Allen.

On appeal, the First Circuit found that injunctive relief could not cure any harm that might have resulted from the completed construction. Furthermore, in the absence of evidence that the fort's operation would threaten any historic sites, injunction barring the use of the fort because of past violations of Federal law would be inappropriate. 668 F.2d at 614. The court vacated the injunction on the understanding that the Federal Government would comply with all the conditions in the consent decree. *Id.* at 616.

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Case 94

Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987).

The city of Duluth and the Fond du Lac Band of Lake Superior Chippewa proposed the construction of a parking garage on land owned by the city which would abut a bingo facility operated by the tribe and the city on Indian reservation land. A citizen brought suit against the city, the Bureau of Indian Affairs (BIA), and the Department of the Interior, alleging that the parking garage could not be constructed until defendants considered the project's effects on the environment and on adjacent historic properties.

Federal involvement in this case was limited to two factors. First, the Federal Government held in trust the building and land where the bingo facility was located. Second, the Secretary of the Interior had approved certain agreements made among the tribe, a commission composed of tribe members, and city representatives, including a contract concerning the adjacent parking garage, even though the structure was financed by the city and was not part of the land held in trust.

Before the Federal Government took the building in trust, the Secretary of the Interior had considered the environmental effects of the proposed bingo facility by issuing an environmental assessment (EA) in accordance with the National Environmental Policy Act (NEPA). The EA did not, however, consider the effects of the parking garage. Plaintiff alleged that the parking garage should have been considered since it was part of a major Federal action and, even if it were not, it was a secondary effect of the Secretary's actions with respect to the bingo facility. Plaintiff also argued that the Secretary failed to consider the adverse environmental effects of the garage as required by NEPA.

In addressing plaintiff's first argument, the court found the Secretary's actions relating to the parking garage to be so incidental that they did not constitute a part of a major Federal action. The court reasoned that the city could construct the garage without Federal approval or assistance. The court found that the Secretary's approval of contracts relating to the parking garage project pursuant to 25 U.S.C. § 81 was not significant enough to establish Federal action.

An affidavit from the BIA official who reviewed the project stated that BIA gave its approval even though its approval was unnecessary. Further, the court observed that the Secretary had no control over the construction of the garage, provided no financial assistance or license, received no revenue from the project, had no input in its design or construction, and did not own the property where the garage would be constructed.

The court also rejected plaintiff's argument that the parking garage was a secondary or indirect effect of the action involving the bingo facility. Because the court found that the parking garage project was non-Federal and only in the proposal stage when the Interior Department prepared the EA, the court concluded that the Secretary was not required to "speculate as to the environmental effects of privately proposed developments that are outside the control of the federal government." 828 F.2d at 1309. Thus, the court found that the Secretary was not required to consider the effects of the parking garage.

In addressing plaintiff's final NEPA claim, that the impact of the proposed parking garage constituted an adverse environmental effect, the court stated that this claim presupposed an obligation on the part of the Secretary to file an environmental impact statement (EIS). According to the court, the Secretary reasonably concluded that there was no major Federal action significantly affecting the human environment and, therefore, an EIS was not required.

With respect to the NHPA claim, the court noted that the parties in this case treated "NHPA's 'undertaking' requirement as essentially coterminous with NEPA's 'major Federal actions' requirement." *Id.* Without questioning this stipulation, the court thus applied the same analysis in the NHPA claim as it did in the NEPA claims, finding that the parking ramp did not constitute an undertaking and, therefore, fell beyond the scope of NHPA.

The court of appeals also rejected plaintiff's argument that the gambling was in violation of Minnesota State law

regulating, but not prohibiting, gambling. Citing United States Supreme Court precedent in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the court explained that a State's regulatory, as opposed to prohibitory, gambling laws do not apply to gambling facilities located on Indian reservations. 828 F.2d at 1309.

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Case 10

River v. Richmond Metropolitan Authority, 359 F. Supp. 611 (E.D. Va.), *aff'd per curiam*, 481 F.2d 1280 (4th Cir. 1973).

The city of Richmond, Virginia, proposed to build a system of expressways. One of the highways, the Downtown Expressway, was to cut through a historic canal that had been filled with dirt and paved years before. Although none of the funds for construction of the Downtown Expressway had come from Federal sources, funding for other parts of the system had. There had been no Federal involvement in the planning of the Downtown Expressway, and the road had never been treated as Federal by the State authorities. There was evidence, however, that Federal funding for other parts of the system had hinged on the city's assurances that the Downtown Expressway would be built to link with the federally funded segments. Plaintiffs alleged violation of Section 106 of the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and other environmental statutes.

The court first found that it had jurisdiction not only over the Federal defendants under the Administrative Procedure Act but also over the non Federal defendants, who had allegedly taken advantage of the benefits conferred by Federal law and whose activities would otherwise make a sham of the Federal statutory requirements. 359 F. Supp. at 622. Furthermore, in discussing the amount in controversy required by 28 U.S.C. § 1331 to establish Federal court jurisdiction, the court found that it need not consider the fact that plaintiff's alleged injury might not add up to more than "symbolic damages" because the pecuniary result of the litigation to defendants might exceed $10,000. [Ed. note: The $10,000 amount in controversy has since been abolished.] A court may find jurisdiction from the viewpoint of either party. *Id.* at 623. The court declined, however, to hear the State constitutional claims under its pendent jurisdiction. *Id.*

Second, the court found that although the nonprofit corporation plaintiff did not have standing on its own under the Administrative Procedure Act since it had only a public interest in the area, the corporation could represent the interests of its members. These members, also plaintiffs, had alleged that the construction of the expressway would injure their use and enjoyment of the canal area. This was found to be sufficient injury-in-fact, and their interests were within the zone of interests protected by NHPA. *Id.* at 625.

Next, the court rejected defendants' claim that the action should be barred by laches because plaintiffs had been aware of the proposed freeway for seven years, concluding that the plaintiffs could not reasonably have been expected to begin the litigation until after a 1972 decision regarding the siting of the expressway or until 1970, when the Federal agency gave its final funding approval. *Id.* at 627.

The court recognized the importance of environmental statutes and the especially heavy burden that defendants must bear to show laches in such suits. The standard that the court applied was whether the costs of altering or abandoning the proposed route would certainly outweigh the benefits that might accrue therefrom to the general public. The court concluded that the location of the Downtown Expressway could have been modified until 1972 and plaintiffs might have secured their relief until that time without court action. *Id.* at 628.

Reaching the merits of the case, the court rejected plaintiffs' argument that the Federal funding of other parts of the system made the Downtown Expressway "Federal." There was no Federal participation in the planning of the expressway, and the possibility that Federal funds might be secured in the future for highway construction was not sufficient to make the expressway Federal. That the State chose to use its Federal highway grant money for other parts of the system to avoid compliance with Federal environmental laws for the Downtown Expressway was found to be irrelevant. *Id.* at 634.

The court also rejected plaintiffs' argument that the system of highways was essentially one project and the Downtown Expressway could not be treated separately. Even though the city perceived the highway system as unified and

interdependent, it did not necessarily follow that the roads comprised a single project. *Id*. The court considered several factors regarding the planning and location of the roads, but could not find that the federally funded roads and the Downtown Expressway constituted a single unified project or had so little value in their own right that separate construction would be considered arbitrary or irrational. *Id.* at 635. The court concluded that there had not been project splitting to avoid the requirements of Federal law. *Id.* at 636.

Moreover, even if the expressway system were viewed as one project, the court found that there was not sufficient Federal contact to cause the whole system to be Federal. Therefore, Federal statutory requirements, such as those imposed by NHPA, did not apply.

Finally, plaintiffs argued that they had a cause of action under the Rivers and Harbors Act of 1899 because the Downtown Expressway was to cut through the old canal. The court held that plaintiffs had standing to maintain a private cause of action under this act. The Rivers and Harbors Act is broad enough to encompass historic values within its zone of interests, *id.* at 637, and parties should be allowed to seek private redress for the creation of obstacles in navigable waters that result in injury to themselves. *Id.* at 639.

However, the court concluded that the canal, because it was filled with dirt and covered with a parking lot, was not one of the navigable waters of the United States, and thus the project was not subject to the act. *Id.* at 640. The court granted summary judgment for defendants.

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Case 156

Sac and Fox Nation of Missouri v. Babbitt, 92 F.Supp.2d 1124 (D. Kan. 2000).

Plaintiffs brought this action, challenging the decision of the Department of the Interior Secretary (Babbitt) to take .52 acres of land into trust on behalf of the Wyandotte Indian Tribe of Oklahoma. The underlying concern of plaintiffs was that the Wyandotte Tribe would use the land as a location for gambling.

Public Law 98-602 appropriated funds, and specifically required that they be used to purchase the land at issue "which shall be held in trust by the Secretary for the benefit" of the Wyandotte Tribe. Among other things, plaintiffs alleged that Secretary Babbitt had violated the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) in taking the land into trust. However, in a brief opinion, the court held that NEPA and NHPA were not applicable because Babbitt was performing a nondiscretionary duty and a "merely ministerial role." The court cited the cases of *Lee v. Thornburgh* (see Case 100), and *U.S. v. 162.20 Acres of Land* (see Case 86).

The court, however, noted that NEPA and NHPA would apply to future actions related to the property.

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Case 11

***Saint Joseph Historical Society v. Land Clearance for Redevelopment Authority*, 366 F. Supp. 605 (W.D. Mo. 1973).**

Plaintiff sought to enjoin a local redevelopment agency from continuing demolition activities in the Market Square Historic District, placed on the National Register of Historic Places in 1972. In 1971, the local agency had executed a loan and capital grant contract with the Department of Housing and Urban Development (HUD). Plaintiff argued that HUD must comply with both the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) before demolition could occur.

The court held that NHPA did not apply because the historic district had not been listed in the Register until after the approval of the grant. That the process of accomplishing the listing had begun at the time the grant contract was executed was immaterial. 366 F. Supp. at 609. [Ed. note: In 1976, Congress amended NHPA to extend coverage to properties eligible for inclusion in the Register as well as to those listed in the Register.]

Furthermore, the court rejected plaintiff's argument that NEPA protects historic buildings whether or not they are listed in the Register, finding that NEPA did not apply in the situation at bar. *Id.* at 609-12. The court denied injunctive relief. *Id.* at 613.

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Case 19

Save the Courthouse Committee v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975).

Plaintiffs, property owners and a nonprofit corporation with members who owned property or resided in the area, sought to enjoin demolition of the old Westchester County Courthouse, which was to be demolished as part of an ongoing urban renewal project funded in part through a Department of Housing and Urban Development (HUD) loan and capital grant. The grant contract was executed in 1965 and amended several times between 1965 and 1973. None of the amendments concerned the plan to demolish the courthouse. HUD approved the demolition contract on December 18, 1974, and concluded that no environmental impact statement (EIS) was necessary under the National Environmental Policy Act (NEPA). In 1973, the Secretary of the Interior determined that the courthouse was eligible for inclusion in the National Register of Historic Places. In January 1975, after the suit had been filed, the courthouse was listed in the Register. Plaintiffs asserted that HUD must comply with the National Historic Preservation Act (NHPA), Executive Order No. 11593, the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA, and NEPA. The court granted plaintiffs' motion for a temporary restraining order.

In considering plaintiffs' motion for a preliminary injunction, the court initially addressed three threshold issues raised by defendants. First, it concluded that it had jurisdiction to review the agency action under the Administrative Procedure Act and 28 U.S.C. § 1331(a). The considerable interests involved in the preservation of cultural resources put the question beyond the jurisdictional amount in controversy required by 28 U.S.C. § 1331 for the district court to assume jurisdiction. 408 F. Supp. at 1331. [Ed. note: The $10,000 amount in controversy has since been abolished.]

Second, the court found that plaintiffs had standing under the Administrative Procedure Act to bring the lawsuit. Plaintiffs had alleged sufficient injury-in-fact both by claiming that demolition would deprive them of the aesthetic benefits they derived from the historic courthouse and because they were residents of and property owners in the area. *Id.* at 1332. Plaintiffs' interest‹to protect the courthouse‹was within the zone of interests protected by NHPA and NEPA. *Id.* at 1333.

Third, the court rejected defendants' laches claim. Because the courthouse still stood, the public interest in preserving historic structures could still be safeguarded, and the purposes of NHPA and NEPA could still be fulfilled, the delay in bringing the suit was not unreasonable or inexcusable. *Id.* at 1333. The court declined to adopt as a date for measuring laches either the date on which demolition of the courthouse was first discussed or the date on which the loan and capital grant contract was executed. Rather, laches would begin to run from the time it became reasonably clear to plaintiffs that other efforts to achieve their ends would be fruitless. *Id.* at 1333-34.

Having disposed of these preliminary questions, the court addressed the applicability of NHPA. Because the courthouse was not listed in the National Register until 1975, the court found that HUD had no responsibilities under NHPA prior to that time. *Id.* at 1335. All of the amendments to the loan and capital grant contract occurred prior to 1975, and none concerned a change with respect to the proposed demolition of the courthouse. HUD had made the overall financial commitment and could not unilaterally reassess its approval of the project. The court found that there were no further approvals forthcoming that would trigger NHPA's requirement for review "prior to approval." From this, the court concluded that it was "highly unlikely" that HUD need comply with Section 106 of NHPA. *Id.* at 1336.

Next, the court held that Executive Order No. 11593 had no bearing on the facts of the case because the courthouse was not within HUD's jurisdiction and control and was not federally owned. *Id.* at 1336-37. However, the court held that HUD was bound by the Council's regulations because HUD had adopted them as part of its own internal procedures. *Id.* at 1338. Relying on the Council's definitions of "undertaking" and "decision," the court found that, unlike Section 106, the Council's regulations are not linked to the timing of the approval of Federal expenditures but apply at any time when changes can still be effected in the undertaking to circumvent an adverse impact. The court concluded that HUD still had opportunity under the grant contract to effect changes in the project. *Id.* at 1339.

Finally, for the same reasons, the court found that NEPA was applicable and that HUD's determination that no environmental impact statement was necessary was defective. *Id.* at 1340 41. The EIS must address currently feasible alternatives to demolition. *Id.* at 1342.

Finding that plaintiffs would suffer irreparable injury should the proposed demolition go forward, which outweighed the harm to defendants that would result from a preliminary injunction, the court granted injunctive relief. *Id.* at 1343-44. The local agency was also enjoined on the ground that it was a partner to HUD. *Id.* at 1344.

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Case 90

Save the Tivoli, Inc. v. United States Department of Housing and Urban Development, Civ. No. 83-1281 (D.D.C. Oct. 16, 1986).

This case addresses the issue of recovery of attorneys' fees and costs under the National Historic Preservation Act (NHPA) when the parties settle a case. The issue arose when a nonprofit corporation and three individuals interested in the preservation and rehabilitation of the historic Tivoli Theater in Washington, D.C., sued the Department of Housing and Urban Development (HUD) and the District of Columbia Department of Housing and Community Development. After the parties settled the case and the court entered a consent decree, plaintiffs sought recovery of attorneys' fees and costs.

The district court turned to the attorneys' fees provision of NHPA to determine whether fees and costs could be awarded. This provision provides that a "court may award attorneys' fees, expert witness fees, and other costs . . . as the court deems reasonable" where a plaintiff "substantially prevails" in a civil action filed in a Federal district court. Slip op. at 2 (citing 16 U.S.C. § 470w-4). Because neither NHPA nor its legislative history, clarified the meaning of "substantially prevails," the court relied on interpretations of similar attorneys' fees provisions in other Federal statutes. When a case is not decided on its merits, courts apply a two-part test in deciding the award of attorneys' fees and costs: "First, the party must have substantially received the relief sought, and, second, the lawsuit must have been a catalytic, necessary, or substantial factor in attaining the relief." Slip op. at 3 (citing *Commissioners Court of Medina County v. United States,* 683 F.2d 435, 440 (D.C. Cir. 1982)). Should the court determine that the test is satisfied, it must decide, in its discretion, whether an award of attorneys' fees and costs will further the purpose of the statute.

Applying the test to the facts of this case, the district court found that the award of attorneys' fees and costs was appropriate. Plaintiffs contended that they substantially received the relief they sought when the District of Columbia withdrew its application for a demolition permit and modified its contract with the developer by conditioning the District's obligations upon completion of the Section 106 review process. Defendants agreed that plaintiffs substantially prevailed but contended that the litigation was not a substantial factor in obtaining their relief.

Specifically, defendants claimed that the application for a demolition permit would have been withdrawn without the lawsuit and was filed merely to expedite the proceedings of the District of Columbia Joint Committee on Landmarks. The court examined the sequence of events leading up to the withdrawal of the demolition permit application and found defendants' argument unsupported by the record. With regard to the contractual modifications, the court rejected the argument that the contractual amendments had been previously agreed to orally and were not a result of the lawsuit, because they could find no evidence in the record to support defendants' contention.

Defendants conceded that the amount sought for attorneys' fees and costs was reasonable. Upon finding the award would further the purpose of encouraging NHPA compliance, the court awarded fees and costs to plaintiffs.

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Case 8

***Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), *dismissed*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).**

In 1965, the Federal Power Commission (FPC) granted a license to a utility company to construct and operate a powerhouse project on the Hudson River at Storm King Mountain, an area of historic significance. Plaintiffs challenged this license. The Second Circuit, noting that Section 10(a) of the Federal Power Act requires that all projects licensed by the FPC be adapted to serve beneficial public uses, including "recreational purposes," held in its first opinion that the term "recreational purposes" encompasses the preservation of historic sites. 354 F.2d at 617. The court remanded the matter to the agency to consider alternative plans in light of this factor. The FPC held further hearings on the project and issued a second decision in 1970 in favor of the license. Plaintiffs then moved to set aside this later decision.

The Second Circuit upheld the FPC's decision and dismissed the lawsuit. The court found no record of any event of historic significance in the area and no impact on the nearest areas of historic importance. 453 F.2d at 475. The court held that the FPC had adequately considered historic resources in its decisionmaking and that its decision to license the powerhouse was supported by substantial evidence. *Id.* at 476.

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Case 60

Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

Plaintiffs, Cherokee Indians, sought to enjoin completion of the Tellico Dam project in Tennessee, which would result in flooding of land that plaintiffs considered to be sacred. Plaintiffs alleged that the Tennessee Valley Authority (TVA) had violated the National Historic Preservation Act (NHPA), among other laws. The district court granted defendants' motion to dismiss.

The Sixth Circuit affirmed, finding that relief under NHPA was foreclosed by a provision in the Energy and Water Development Appropriation Bill, Public Law No. 96-69, which authorized the Tellico Dam. That law stated that TVA was authorized to complete the dam notwithstanding any other law. The court read this as a clear congressional command that the dam could not be enjoined because of noncompliance with NHPA. 620 F.2d at 1161.

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Case 139

Sierra Club v. Slater, 120 F.3d. 623 (6th Cir. 1997).

The Sierra Club, along with other plaintiffs, sought to enjoin the construction of an urban corridor development project known as the Buckeye Basin Greenbelt Project in Toledo, Ohio, and claimed a variety of environmental violations in a suit against multiple Federal, State, and municipal defendants. In this order, the court ruled on plaintiffs' appeal of the district court's grant of summary judgment to defendants on all parts of the complaint. The district court dismissed Counts I, IV, and V in full, and Counts III and VIII in part, under the six-year statute of limitations on all suits against the United States. The appellate court confirmed this ruling.

Of importance here is plaintiffs' claim that the Army Corps of Engineers (Corps) improperly failed to give the Advisory Council on Historic Preservation (Council) an opportunity to review and comment on its conclusion of "no adverse effect" on historic properties. In response, defendants pointed out that the district court found that the Federal Highway Administration (FHWA) submitted its own "no adverse effect" findings to the Council, and that those findings were identical to the Corps' findings.

Although plaintiffs conceded that the findings of the two entities "may have been similar," they maintained that FHWA's record "was not at all similar to the record that would have been submitted by the Corps" if the Corps had complied with its obligation to compile and submit a record.

Further, plaintiffs did not dispute that the Council was fully apprised of the FHWA findings regarding historic properties; that the FHWA findings were identical to those of the Corps; and that the Council concurred in the "no adverse effect" finding. After reviewing both NHPA requirements and the internal regulations of the Corps, the court stated that the regulations of the Corps made clear, as defendants argued, that they were entitled to rely on the lead agency—here, FHWA—in complying with NHPA. 16 U.S.C. Section 470f; 33 C.F.R. part 325, appendix C(2)(c). The court concluded that plaintiffs had failed to articulate any recognizable error on this issue.

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Case 88

Sierra Club v. Watt, No. CV-83 5878 AWT (C.D. Cal. Nov. 18, 1983), *aff'd sub nom. Sierra Club v. Clark,* 774 F.2d 1406 (9th Cir. 1985).

Plaintiffs challenged both the Bureau of Land Management's (BLM) California Desert Conservation Management Plan, which designated a motorcycle race route, and BLM's issuance of a permit to conduct the race. Although BLM had prepared an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), it failed to consult with the State Historic Preservation Officer (SHPO) prior to issuing the permit. Nevertheless, after issuing the permit, BLM consulted with the SHPO and instituted measures designed to mitigate the adverse impacts of the race on the desert. The SHPO concurred in the issuance of the permit.

The district court initially addressed several procedural questions. First, the court concluded that even though plaintiffs had not exhausted their administrative remedies, their failure to do so would not defeat their action. Exhaustion was not required by statute, and the court found that pursuit of the administrative remedies would be futile and application of the exhaustion rule would bar consideration of a decision with wide-ranging effects on the public interest. Slip op. at 5-6.

Second, the court upheld plaintiffs' standing to sue. *Id.* at 7. Third, finding that the use of laches should be restricted in environmental suits, the court rejected defendants' argument that plaintiffs had delayed too long by waiting three and a half weeks after the permit was issued to file the action. The delay was not unreasonable, and defendants had shown no prejudice. *Id.* at 7-8.

In considering the likelihood of plaintiffs' success on the merits for purposes of the motion for preliminary injunction, the district court rejected plaintiffs' argument that the EIS was inadequate under NEPA because it did not consider site-specific mitigation measures for cultural resources. The court found, among other things, that BLM adequately considered the need to minimize adverse impacts on desert resources by discussing mitigation measures briefly in the EIS and by implementing substantial site-specific mitigation measures not incorporated in the EIS. *Id.* at 18.

The district court also rejected plaintiffs' claims that BLM had violated the National Historic Preservation Act (NHPA) and the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA by failing to consult with the SHPO until after preparing the EIS and issuing the permit for the race. The court declined to decide whether the word "should" in the Council's regulations required BLM to consult with the SHPO before taking these actions because the SHPO had concurred in the issuance of the permit after it had been issued and BLM had taken mitigation measures after consulting with the SHPO. The court found that these actions "achieved the results contemplated by NHPA" and held that the issuance of the race permit was in "substantial compliance" with NHPA. *Id.* at 20.

Because the court believed that plaintiffs had not demonstrated a fair chance of success on the merits, the court denied plaintiffs' motion for preliminary injunction. *Id.* at 21, 23.

The Ninth Circuit affirmed the district court's finding that BLM acted in accordance with all applicable statutes, including NHPA. The court acknowledged that BLM failed to consult with the SHPO prior to the issuance of the permit for the race. 774 F.2d at 1410. Nevertheless, the court affirmed the district court's conclusion that BLM had satisfied the requirements of Section 106 because of the "fact of actual concurrence by the SHPO in the issuance of the permit, together with the imposition of mitigation measures the SHPO requested." *Id.* In concluding that BLM's issuance of the permits was appropriate, the court referenced BLM's "extensive implementation of mitigation measures" and its "response to the public concern" because such actions minimized the adverse impacts of the race. *Id.* at 1410-11. It also emphasized that both Congress and an executive order mandated provision of trails for off-road vehicles. Additionally, the court found that the impact of the trail would not impair the suitability of the area for

preservation as wilderness, as required by Section 603(c) of the Federal Land Policy and Management Act. Finally, the court of appeals, like the district court, found that the EIS appropriately provided the public with environmental information, explored alternatives, and proposed mitigative measures which were implemented to reduce adverse effects.

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Case 146

Society Hill Towers Owners' Assn. v. Rendell, 20 F. Supp. 2d 855 (E.D. Penn. 1998).

Plaintiff, a group of residents of Philadelphia's Society Hill neighborhood, sought judicial review of a decision by the U.S. Department of Housing and Urban Development (HUD) to approve a $10 million Urban Development Action Grant (UDAG) to the City of Philadelphia. This grant was to assist in funding the public portion of the development costs of a hotel and parking garage.

Plaintiff asserted that the city failed to comply with the applicable environmental statutes and regulations, conducted its procedural obligations out of sequence, and failed to take other nearby projects into account while assessing the project's cumulative impacts. Additionally, plaintiff claimed that the city and HUD failed to take into account the effects of this project on the historic structures and districts in the area as required by the National Historic Preservation Act (NHPA).

The court examined HUD's delegation of environmental and historic review responsibilities to the city under the authority of Title I of the Housing and Community Development Act of 1974. It also looked at the regulations promulgated by HUD for the agency to satisfy the requirements of the National Environmental Policy Act (NEPA) for grant recipients who assume HUD's NEPA responsibilities. It also reviewed the congressional record confirming that the delegation of authority extended to other acts that further the purposes of NEPA, including NHPA.

The court noted plaintiff's frustration at its inability to convince HUD to intervene in the review process. However, the court found that, through the statutory delegation of responsibility, the city, and not HUD, was responsible for compliance with the relevant statutes and regulations as well as responding to objections from the public. HUD only retained final authority for ensuring that the grant applicant adhered to the proper statutory and regulatory procedures.

The court then proceeded to review the City's compliance under the special Section 106 regulations, found under 36 C.F.R. part 801, that apply to the UDAG program. Plaintiff argued that the City and HUD had failed to comply with their Section 106 responsibilities and had denied the Advisory Council on Historic Preservation (Council) its reasonable opportunity to comment by proceeding with a "no effect" finding without the Council's review. The Court noted, however, that the special Section 106/UDAG regulations did not require such review where, as here, the City arrived at the "no effect" finding in consultation with the State Historic Preservation Officer. The special regulations also made it clear that the City, and not HUD, had the responsibility to make the "no effect" finding. The court, therefore, found that the City's Section 106 review was in compliance, and that HUD's procedural oversight role was not implicated.

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Case 48

***Soucheray v. Corps of Engineers*, 483 F. Supp. 352 (W.D. Wis. 1979).**

Plaintiffs, landowners on the shores of Lake Superior, sought to compel the Army Corps of Engineers to lower the water level of Lake Superior. The Corps was the United States member of the Lake Superior Board of Control, which was created by the International Joint Commission that was established by the Boundary Waters Treaty of 1909 between the United States and Canada. The board, under supervision of the commission, controlled dams and compensating works that regulated the flow of water out of Lake Superior. Among other things, plaintiffs claimed that the Corps was violating the National Historic Preservation Act.

The court held that the actions taken in the regulation of Lake Superior outflow were actions taken under the authority and direction of the commission. By signing the treaty, the United States gave up any control over the diversion, obstruction, and use of the boundary waters. The increased water level could not be attributed to the United States. Any actions taken by the Corps' representatives were undertaken in their capacity as board or commission members and not as employees of the United States. The United States was not responsible for the conduct of these bodies in the regulation of Lake Superior.

The court therefore concluded that the Corps' representatives were immune from suit under 28 U.S.C. §§ 228a(1) and 228a(6), 483 F. Supp. at 355, and no relief was available on plaintiffs' statutory claims. *Id.* at 357.

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Case 2

South Hill Neighborhood Association v. Romney, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970).

Nonprofit organizations, taxpayers, and property owners challenged part of an urban renewal plan adopted in 1965 by the urban renewal agency of the city of Lexington, Kentucky. Implementation of the plan was to be funded by a loan and capital grant that had been approved in 1966 by the Department of Housing and Urban Development (HUD). HUD approved amendments to the plan in 1968 and 1969. The renewal area contained historic properties, 14 of which were within the West High Street Historic District, listed in the National Register of Historic Places in 1969. Soon after, the local agency accepted a development proposal submitted by the Citizens Union Bank for construction of an office building on part of the land included in the renewal area. The city and the bank executed a contract that required the buildings in the area to be demolished. After title to the land had passed from the local agency to the bank, HUD approved demolition of seven of the buildings and demolition began. Plaintiffs sought to enjoin demolition, alleging that HUD had failed to notify the Advisory Council on Historic Preservation of the proposed demolition as required by Section 106 of the National Historic Preservation Act (NHPA).

The Sixth Circuit affirmed the district court's dismissal of the action on the ground that plaintiffs lacked standing, incorporating the lower court's memorandum into its opinion. Plaintiffs had not established a logical link between their taxpayer status and NHPA. Moreover, none of the plaintiffs had any real interest in the project, as none of them owned or had legal control over any of the buildings at the time they were placed on the National Register and none had submitted a development proposal for the area. 421 F.2d at 460-61. The court also rejected plaintiffs' argument that they had standing under the "private attorney general" doctrine because they had no direct interests in the buildings and had not engaged sufficiently in the administrative process to show a special interest in the controversy so as to be included among those parties aggrieved or adversely affected by agency action. *Id.* at 461. [Ed. note: This case preceded the Supreme Court's landmark standing decision in Sierra Club v. Morton, 405 U.S. 727 (1972), in which the court found allegations of use of an area to be sufficient to confer standing.]

The court went on to say, however, that even if plaintiffs did have standing, they would not be entitled to relief because the grant contract and the contract amendments occurred before the buildings had been placed on the National Register. *Id.* at 461-62. Rumors of the historic significance of the buildings were not enough to require HUD to notify the Council. HUD's subsequent approval of demolition did not trigger NHPA, which applies only when an agency authorizes plans or amendments to plans and enters into the resulting grant contract. *Id.* at 462.

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Case 24

Stop H-3 Association v. Coleman, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976).

Plaintiffs sued to enjoin construction of a highway through the Moanaloa Valley in Hawaii that was to be funded by the Federal Highway Administration (FHWA). The Secretary of the Interior had determined in 1974 that the valley "may be eligible" for inclusion in the National Register of Historic Places based on its local significance. In addition, the proposed route was to pass close to a large petroglyph rock, an object that was listed in the Register in 1973. The State historic review board, however, had decided that the valley was of marginal significance and concluded that it did not warrant protection from destruction.

FHWA requested the Advisory Council on Historic Preservation to comment under Section 106 of the National Historic Preservation Act (NHPA) on the impact of the highway on the petroglyph rock. The Council broadened its review to include the entire valley and concluded that both the rock and the valley possessed historical, cultural, and archeological significance justifying their preservation. After this review had been completed, FHWA decided that the valley was not a historic site under the provisions of Section 4(f) of the Department of Transportation Act and Section 15(a) of the Federal-Aid Highway Act despite the findings of the Secretary of the Interior and the Council.

Plaintiffs alleged that FHWA must comply with Section 4(f) with regard to the entire valley because the Secretary of the Interior had determined the valley to be eligible and the Council had assessed the property as having historic significance. Plaintiffs argued that the Federal determination took precedence over the evaluation made by the State board. The district court disagreed, attaching more significance to the State board's determination of marginal significance than to the determinations of the Secretary of the Interior and the Council.

The Ninth Circuit reversed, holding first that the Secretary of the Interior's determination that the valley "may be eligible" satisfied the definition of an "eligible property" in the Council's regulations implementing Section 106 of NHPA. The Secretary's designation could not be vitiated by the State board's finding of marginal significance. 533 F.2d at 440-41. The Secretary's power to determine properties to be eligible extends to properties of National, State, or local significance. *Id.* at 441.

Second, the court rejected defendants' argument that Section 4(f) is limited to properties actually listed in the National Register. *Id.* at 442. Rather, the court held that an Interior Department determination that a property is "likely to meet" the National Register criteria constitutes a finding that the property has historic significance for purposes of Section 4(f). *Id.* at 443-44.

Third, the court found that Section 2(b) of Executive Order No. 11593, by its own terms, did not apply to the valley because the valley was privately owned property. *Id.* at 443.

Fourth, the court held that neither NHPA nor the Council's regulations preclude the Secretary from determining, on his own initiative, that a property is eligible for inclusion in the Register. *Id.* at 444.

Finally, the court noted that although Section 4(f) does not require FHWA to set forth specific findings and reasons for approving a project that will use land from a historic site, FHWA must evaluate the highway project with the mandates of Section 4(f) clearly in mind. *Id.* at 445. The court remanded the case to the district court with an order to enjoin construction of the highway until defendants could demonstrate compliance with Section 4(f).

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Case 135

***Streater v. United States Department of Transportation*, No. CIV. A. 95-2162 (E.D. Pa. Mar. 25, 1996).**

Plaintiffs, an individual and an environmental association, challenged a 3.5-mile extension of a highway approved by the Department of Transportation (DOT). Alleging violations of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA), plaintiffs argued that DOT failed to consider the impact of the interchange design and to identify all historic properties potentially affected by the project.

The district court opinion addressed the issue of plaintiffs' standing to sue, focusing on plaintiffs' alleged injuries. The court first addressed plaintiffs' claim that they would be harmed by a negative economic impact of the route expansion as a result of development in the surrounding area which plaintiffs argued would be an indirect effect of the expansion. The court found that the plaintiffs would not suffer economic harm because they did not allege that they owned businesses in the area or lived or shopped in the areas identified as being affected by the project. Slip op. at 2. Specifically, the court determined that plaintiffs had not asserted a particularized interest and could, therefore, not meet the standing requirement. Further, the court found that plaintiffs had not demonstrated a causal connection between the extension of the route and economic harm. The court declined to accept plaintiffs' allegations that the 3.5-mile road project would have so significant an impact on businesses in three nearby cities that the quality of life and shopping would decline, finding them too speculative. Slip op. at 3. With regard to the allegations of economic harm, the court finally found that plaintiffs' allegations would not be redressable by the court.

As another injury plaintiffs alleged that the road expansion would result in suburban sprawl and thus affect plaintiffs' aesthetic interest in the enjoyment of the green spaces in the valley. The court determined that the possible suburban sprawl was not sufficiently caused by the road project but, rather, was contingent upon other factors such as willing buyers and sellers of property and approval of municipal subdivisions. Thus, the court held that plaintiffs failed to demonstrate a causal connection between the extension project and the suburban sprawl. Slip op. at 4.

With regard to plaintiffs' allegation that defendants did not take into account the effect of the extension on historic properties in the area, the court found plaintiffs did not identify any particular harm which might result to either the historic structures or to plaintiffs' enjoyment of them because plaintiffs' allegations were viewed as an "abstract injury or generalized grievance" the court held that plaintiffs failed to meet the standing requirements. *Id.* The court observed that plaintiffs had improperly alleged injury flowing from the alleged violation of the law rather than an injury arising from an identified impact upon the historic structures which affects plaintiffs' aesthetic interests. Further, the court noted that plaintiffs failed to assert that they visited or planned to visit the historic sites, explaining that the mere possibility or general intention of someday visiting or enjoying a site is insufficient to establish an imminent injury to plaintiffs' aesthetic interest. Similarly, as a final argument, the individual plaintiff alleged that travel by bicycle or on foot would be hindered by the route expansion; however, the court found that the individual plaintiff did not allege a particularized injury because he failed to assert that he ever traveled by foot or bicycle between the two cities allegedly affected by the project.

The court dismissed the action for lack of standing.

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Case 115

Sugarloaf Citizens Association v. Federal Energy Regulatory Commission, 959 F.2d 508 (4th Cir. 1992).

The National Trust for Historic Preservation, the Sugarloaf Citizens Association, and other citizens appealed a Federal Energy Regulatory Commission (FERC) order which certified a resource recovery facility as a qualifying small power production facility under the Public Utility Regulatory Policies Act (PURPA). Petitioners requested FERC to review the facility's environmental and historic impacts under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA), alleging that the facility would severely impact the Sugarloaf Mountain Historic District. FERC found that certification of the facility was neither a major Federal action triggering NEPA review nor an undertaking requiring review under NHPA and, consequently, denied petitioners' requests.

The court of appeals affirmed FERC's decision. At the outset, the court observed that when an agency determines that its actions do not constitute a major Federal action, the reviewing court decides whether that determination was reasonable under the circumstances. 959 F.2d at 512. According to the court, major Federal actions include non-Federal actions if the project cannot begin or continue without prior Federal agency approval and if the agency possesses "actual power to control the non-federal activity." *Id.* (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988)).

Petitioners argued that a contractual agreement between facility owners and the Potomac Electric Power Company required FERC to render certification and, but for the certification, the project could not proceed. *Id.* at 512-13. The court found, however, that the project could have continued without FERC certification because the certification was merely a ministerial act in which FERC had no discretion. Under FERC regulations, if a facility meets certain enumerated criteria, it is automatically eligible for benefits under PURPA. The facility was not required to apply for certification and, indeed, could have relied on self certification. *Id.* at 513.

Moreover, the court found that FERC did not possess actual power to approve construction or operation of the facility but, in fact, had merely determined that the facility met the regulatory qualifications PURPA established. According to the court, FERC merely regulates the rates paid to the qualifying facility and does not control project financing, construction, or operation. The court, therefore, found FERC did not have power over the project.

The court applied similar reasoning with regard to the NHPA claim, taking the position that the standard for triggering NHPA is similar to that of NEPA. The court interpreted NHPA as having a narrow reach, finding that an agency must comply only if it has the authority to license or approve expenditures for a project. *Id.* at 515. Thus, because there was neither Federal funding nor licensing involved in the *Sugarloaf* case, the court determined that the certification was not an undertaking and that NHPA did not apply.

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Case 91

***Techworld Development Corporation v. District of Columbia Preservation League*, 648 F. Supp. 106 (D.D.C. 1986).**

Plaintiffs sought injunctive and declaratory relief in this consolidated action resulting from the proposed construction of the International Trade Center, known as "Techworld," to house technology and information industries in downtown Washington, D.C. As an integral part of the plan, developers sought to have a street that was a component of the historic L'Enfant Plan, closed and its title transferred. Several city agencies reviewed the application to close the street and recommended that the District of Columbia City Council grant the application, although the local historic preservation review board opposed the proposal. The National Capital Planning Commission (NCPC), a Federal agency, also made a non-binding recommendation in favor of the street closing.

The City Council approved the street closing and title transfer after holding hearings and deciding to include several covenants as conditions to the street closing. In accordance with the District of Columbia Self-Government and Governmental Reorganization Act (the Home Rule Act), the City Council forwarded its decision to Congress for a 30-day review period. Congress did not exercise its right to veto the decision.

The developer also sought status for Techworld as a Planned Unit Development (P.U.D.) from the local zoning commission, which would allow its structures to vary from zoning regulations. The zoning commission granted that status, but imposed so many conditions that the developer withdrew the application and decided to proceed within the existing zoning regulations.

In challenging the city's decision to close the street and transfer title, plaintiffs made several arguments. First, they alleged that the City Council had exceeded its authority under the Home Rule Act by violating a provision that prevents the city from making laws with regard to property of the United States. 648 F. Supp. at 111. In reviewing the legislative history of the Home Rule Act and its predecessor statutes, in addition to the history of street closings, the court determined that the city acted within its authority. The district court reasoned that authority over city streets is a "paradigmatic municipal function." *Id.* The legislative history revealed that Congress did not deem it appropriate for a national assembly to invest time in such matters, and Congress had never vetoed a street closing.

Plaintiffs' second argument was that the City Council's action violated the Appointments Clause of the United States Constitution because the city exercised significant Federal authority when closing the street. The court rejected this argument, stating that the Federal concerns contemplated by the case law interpreting the Appointments Clause were absent from the present case. *Id.* at 115. United States Supreme Court precedent interpreting the Appointments Clause supported the view that Congress may delegate its authority to aid in the functioning of Congress. *Id.* at 116 (citing *Buckley v. Valeo*, 424 U.S. 1,139 (1976)). Congress has a dual function with regard to the District of Columbia, the court noted. It can act as a Federal or State body as circumstances dictate. In delegating street closing authority to the City Council, the court determined that Congress was acting in its capacity as a State body over the District of Columbia and was granting municipal responsibilities, not any significant Federal authority.

Third, plaintiffs alleged that the developer had made an implied covenant with the City Council to proceed with the development as a P.U.D. and that it was therefore improper for the developer to withdraw the application. The court rejected this argument outright, pointing out that the City Council and the Mayor, the parties with whom the alleged implied covenant was made, represented that there was no such covenant. The court also noted that the existence of the five express covenants imposed by the City Council made it highly unlikely that a sixth implied covenant existed. Indeed, the court found that the City Council considered the substance of the implied covenant at the same time the other covenants were adopted and, thus, it was likely that the idea was deliberately rejected because it was not included as an express covenant.

Plaintiffs' claim under the National Historic Preservation Act (NHPA) alleged that NCPC involvement in the project triggered the requirements of Section 106. Specifically, plaintiffs argued that the recommendation made by NCPC to the City Council regarding the street closing constituted an undertaking and, thus, that the Advisory Council on Historic Preservation should have been provided an opportunity to comment prior to the closing. The court concluded that Section 106 did not apply because the project did not involve the approval of the expenditure of Federal funds or the issuance of a Federal license; the Federal involvement in the case was limited to NCPC's non binding recommendation that the street closing proceed.

The court found that the definition of undertaking in the statute was dispositive, particularly in light of Congress' 1980 amendments to NHPA which define undertaking according to the terms of Section 106, and rejected plaintiffs' argument that the Council's regulatory definition of undertaking encompassed the type of Federal action engaged in by NCPC. *Id.* at 119. According to the court, the Council's regulation "requires the federal agency be substantially involved in the local project, either with its initiation, its funding, or its authorization, before a local project is transformed into a federal undertaking." *Id.* at 120. The "minimal participation" of NCPC did not fall within the definition of an undertaking. *Id.* The court also noted that NCPC itself did not find that its purely advisory role constituted an undertaking. *Id.*

Plaintiffs also alleged under the Height of Buildings Act of 1910 (HBA) that developer's plans to build Techworld to a height of 130 feet violated the HBA provision that limits building height to 110 feet. As a preliminary matter, the court found the claim to be ripe even though the District of Columbia had not yet issued a construction permit for the proposed building. The court reasoned that substantial controversy existed because the developer made clear his intention to construct the building to 130 feet and plaintiffs made clear their opposition to the height. In another preliminary matter, the court addressed the issue of plaintiffs' right to bring the action under the HBA. The court ruled that preservationists did not have a private right of action under the HBA, but the Federal Government, as a neighboring property owner, did. On the merits of the HBA claim, the court acknowledged that opinions of the District of Columbia Corporation Counsel with regard to the HBA were entitled to substantial deference and, after examining the Corporation Counsel's decision, deferred to its judgment.

As a final claim, plaintiffs argued that the District of Columbia Historic Landmark and Historic District Protection Act applied to the Techworld plans. This statute requires the Historic Preservation Review Board to review permit applications that involve destruction or alteration of a historic landmark. Although the "Eighth Street Vista from Mt. Vernon Square to National Archives" was listed in the District's inventory of historic sites, the court found the listing inaccurate because the view between Mt. Vernon Square and the National Archives was obstructed by the National Portrait Gallery. The "inscrutable" and "flawed" listing led the court to determine that the landmark statute did not apply to Techworld. *Id.* at 124.

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Case 9

Thompson v. Fugate, 347 F. Supp. 120 (E.D. Va. 1972).

This was an action to enjoin construction of a highway through plaintiffs' property, Tuckahoe Plantation, which had been designated as a National Historic Landmark and was listed in the National Register of Historic Places. The highway was a small segment of a beltway system around Richmond, Virginia. Although most of the beltway had been funded by money granted by the Federal Highway Administration (FHWA), this particular segment had not. The State had received location approval from FHWA for the unfunded segment, but apparently not for that portion passing through plaintiffs' land.

First, the court rejected the motion of the State Highway Commissioner to dismiss the suit on the ground that the Eleventh Amendment of the United States Constitution gave the State sovereign immunity, as the suit was against the commissioner and not the State. 347 F. Supp. at 123.

Next, the court held that the beltway, including the segment, was a federally assisted undertaking. *Id.* at 123. The small segment of the beltway passing through plaintiffs' land could not be separated from the whole beltway, but must be considered as part of the entire project. *Id.* at 124. Thus, even though there had been no Federal involvement in the specific segment at issue, the requirements of the National Historic Preservation Act, the National Environmental Policy Act, Section 4(f) of the Department of Transportation Act, and Section 15(a) of the Federal-Aid Highway Act must be met for this segment because most of the beltway had been federally funded or approved. *Id.* at 124, 125, 128. The court rejected the argument that it was too late to enforce these statutes, holding that the statutes apply to unexecuted parts of the project. *Id.* at 124-25.

The court enjoined the highway project until defendants could comply with the Federal statutes. *Id.* at 125.

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Case 92

Town of Belmont v. Dole, No. C83 241-L (D.N.H. Aug. 20, 1983), *rev'd*, 766 F.2d 28 (1st Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

Two towns sought to block construction of a federally assisted highway through an archeological district identified as a result of a survey done in the preparation of an environmental impact statement under the National Environmental Policy Act. In nominating the district to the National Register of Historic Places, the State Historic Preservation Officer (SHPO) had stated that the district was significant only for the archeological data it contained. The Secretary of the Interior listed the district in the Register in 1982.

The Federal Highway Administration (FHWA), which was the Federal funding agency, decided that Section 4(f) of the Department of Transportation Act was not applicable to the project based on a section of its regulations that stated that Section 4(f) did not apply to archeological sites where FHWA, in consultation with the SHPO and the Advisory Council on Historic Preservation, had determined that the archeological resources were important chiefly for the information they contained and had minimal value for preservation in place.

The district court held that the requirements of Section 4(f) were triggered when the Secretary of the Interior, a Federal official with the jurisdiction to determine that a site had historic significance, found the site to be historically significant and listed it in the Register. Slip op. at 9-11. Because FHWA's regulation allowed it to circumvent the restrictions on agency action contained in Section 4(f) in contravention of the section's express language, the court held that the regulation was void. *Id.* at 13. The court permanently enjoined the defendants from continuing with the undertaking until a Section 4(f) statement could be prepared. *Id.* at 16.

The court of appeals reversed the district court and found the regulation to be consistent with the statute. Preliminarily, the court noted that FHWA promulgated the regulation pursuant to its general rulemaking authority to implement transportation statutes. 766 F.2d at 30. The court also noted that when promulgating its archeological regulation, FHWA reconciled the purposes of Section 4(f) with the requirements of the National Historic Preservation Act (NHPA) and that the SHPOs and the Council had found the regulation satisfactory. *Id.* at 31.

In evaluating the lawfulness of the regulation, the court applied the standard that a rule is lawful if it is reasonable and not contrary to the relevant statutes. *Id.* (citing *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981)). Applying this standard, the court found that the archeological regulation was consistent with Section 4(f). The court first analyzed the language of the statute which states its application to "the use of . . . land of an historic site of national, State or local significance." *Id.* at 29 (citing 49 U.S.C. § 303). According to the court, once the archeological data is removed, the site lacks "significance." The court also interpreted the term "use" as contemplating an adverse effect and said that the removal of archeological resources to preserve the data would thus not constitute a "use" within the meaning of Section 4(f). *Id.* at 32.

Upon examining the archeological regulation in light of the purpose of Section 4(f), the court found that the statute and the regulation were consistent. *Id.* The court explained that allowing retrieval of archeological resources which are significant only for the data which they contain would better preserve the historic resources than avoiding the archeological site. Because avoiding an archeological site would leave the site in the hands of private owners who are free to ignore the site's archeological value, the agency's retrieval of archeological resources in accordance with a carefully designed plan would better protect resources at issue. *Id.* To support its reasoning, the court cited comments made by several SHPOs who filed *amicus* briefs in the proceedings. *Id.* at 33. According to the court, if FHWA were to find significant archeological sites and avoid them rather than retrieve the valuable resources, such a program would not serve the preservation goals of Section 4(f). *Id.*

Finally, the court was persuaded by the regulation's substantive and procedural safeguards. *Id.* It observed that the

archeological regulation would not apply if the items had "in place" significance, or if an appropriate recovery plan could not be developed. The court also noted that in this case FHWA claimed that there was no objection by State and Federal officials that the archeological site near the town of Belmont was valuable solely for the data it contained. However, the court declined to render an opinion on whether the archeological regulation could apply if the SHPO or the Council disagreed with FHWA's determination. 766 F.2d at 33 (citing *Stop H-3 Association v. Coleman,* 533 F.2d 434, 441-42 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976)). The court noted there was authority for the position that a claim by the SHPO, the Council, or the Department of Transportation is sufficient to trigger the protection of Section 4(f).

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Case 141

Tyler v. Cisneros, 136 F.3d 603 (9th Cir. 1998).

Plaintiffs, Tyler et al., sought to enjoin the City of San Francisco from building a low-income housing project next to their homes, which were eligible to be listed in the National Register of Historic Places. The project was to be constructed with Federal funds. Plaintiffs argued that the U.S. Department of Housing and Urban Development (HUD) and the other listed defendants failed to meet the terms of their own Memorandum of Agreement (MOA), which was designed to mitigate the project's impact on plaintiffs' homes. Plaintiffs sought a preliminary injunction under the National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA).

The district court denied the preliminary injunction and granted defendants' motion to dismiss. The court ruled that plaintiffs' NHPA claims were moot because NHPA contains an implicit statute of limitations, which barred assertion of NHPA claims once the Federal agency (HUD) released the funds to the city. In holding this, the court relied on 36 C.F.R. Section 800.3(c), which states in part, "Section 106 requires the Agency Official to complete the Section 106 process prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license or permit."

The court went on to rule that even if there was no implicit statute of limitations in NHPA, plaintiffs' claims would fail because HUD no longer exercised "continuing authority" over the funds. The court used a similar analysis under NEPA because HUD had "ceased to exercise continuing authority over the project once it disbursed the funds."

In reversing, the Ninth circuit court of Appeals stated that there was no implicit statute of limitations in NHPA. Rather, a more common sense reading of Section 106 would suggest that the "prior to" language the district court relied on merely refers to the timing of agency compliance. See 36 C.F.R. Section 800.3(c). In other words, this language establishes a time during which the agency is required to conduct an NHPA review, not the time during which a plaintiff is required to bring a lawsuit. Indeed, construing the language as the district court did runs counter to the implied private right of action to file claims under NHPA, effectively leaving no time slot open for a plaintiff to file suit.

Furthermore, the court stated that it has never held that an implicit statute of limitations bars plaintiffs from bringing suit under NHPA once funds are released. Rather, the court has applied the laches doctrine to resolve the timeliness of both NHPA and NEPA claims.

The appellate court also found the continuing authority aspect of the district court's decision to be erroneous since the plain language of NEPA and NHPA regulations states that the Federal agency may have some continuing authority because it is a party to the agreement.

Further, the appellate court overruled the district court's decision that the city's Federal environmental review responsibilities ceased once Federal involvement in the project ceased. The statute authorizing delegation of HUD's NHPA and NEPA review responsibilities provides that the local official "consents to assume the status of a responsible Federal official under [NEPA and other Federal laws] and...consents...to accept the jurisdiction of the Federal courts for the purpose of enforcement of his responsibilities as such an official." 42 U.S.C. 12838(c)(4). This means that the city, as a signatory to the MOA, remains liable under NHPA and NEPA for its failure to carry out the terms of the MOA.

This case was remanded to the district court to first address the standing issue and then, if it is found that plaintiffs have standing, to decide the extent of HUD's and the city's obligations to plaintiffs under the MOA and whether these obligations were breached.

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Case 25

***United States ex rel. Tennessee Valley Authority v. Three Tracts of Land*, 415 F. Supp. 586 (E.D. Tenn. 1976).**

The United States filed a complaint and declaration of taking on behalf of the Tennessee Valley Authority. Defendants asserted that the Government's noncompliance with Section 106 of the National Historic Preservation Act (NHPA) and Executive Order No. 11593 invalidated the taking.

The court rejected this argument, finding that Section 106 and Executive Order No. 11593 impose duties on a Federal agency that arise once the agency obtains ownership or control of property. Because condemnation is a means to acquire property and neither NHPA nor Executive Order No. 11593 limits an agency's authority to acquire property through condemnation, the court held that neither law operates as a defense to a condemnation action. 415 F. Supp. at 588.

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Case 26

United States v. 4.18 Acres of Land, 542 F.2d 786 (9th Cir. 1976).

The United States brought this action on behalf of the Forest Service to condemn 4.18 acres of land. The district court dismissed the suit because the United States had not complied, prior to commencing the condemnation action, with the regulations of the Advisory Council on Historic Preservation. The Forest Service then completed the Council's requirements, and defendants sought attorneys' fees under the Uniform Relocation Assistance and Real Property Acquisition Policies Act. The district court denied the motion for fees.

The Ninth Circuit affirmed. The constitutional requirement of just compensation for the taking of land by condemnation does not include attorneys' fees, and a court may not grant such fees against the United States absent an authorizing statute. 542 F.2d at 788. The act in question did not require an award of fees. *Id.* at 789. [Ed. note: NHPA was amended in 1980 to provide for award of attorneys' fees and costs.]

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Case 86

United States v. 162.20 Acres of Land, 639 F.2d 299 (5th Cir. Unit A), *cert. denied*, 454 U.S. 828 (1981), *on remand*, 567 F. Supp. 987 (N.D. Miss. 1983), *aff'd*, 733 F.2d 377 (5th Cir. 1984).

The United States sought to condemn property to be incorporated into the Barton Ferry Recreation Area, part of the Tennessee Tombigbee Waterway Project. On the property, on the site of the abandoned town of Barton, sat a house known as Cedar Oaks. Both Barton and Cedar Oaks were listed in the National Register of Historic Places as within a multiresource district created for the purpose of listing historic sites in the project area.

The property owners raised as a defense to the condemnation the allegation that the Government had failed to comply with the National Historic Preservation Act (NHPA).

The Fifth Circuit agreed with the district court that noncompliance with NHPA did not amount to a defense against taking. Under the Declaration of Taking Act, the filing of the declaration of taking and deposit of estimated compensation accomplishes the taking. The court must then decree the transfer of title to the Government. 639 F.2d at 303. The vesting of title in the Government is a neutral act vis-à-vis NHPA, for Federal agencies must comply with NHPA regardless of the public or private character of the property involved. *Id.* at 304.

Because the role of the courts in condemnations is limited to the bare consideration of whether the United States has the legal authority to take, the court reasoned that noncompliance with NHPA is not a defense to the taking absent an express statement to the contrary by Congress. *Id.*

Nevertheless, although the court cannot stay passage of title, it may withhold physical possession and enjoin any activity that may disturb the environment‹cultural or physical‹pending compliance with NHPA. *Id.* Thus, in the words of the court, "while the NHPA does not provide a legal shield against the exercise of the Federal condemnation power, it can provide the condemnee with a sword which he may use to seek judicial scrutiny of compliance with the congressional command that adverse impact upon historical features of the condemned land be mitigated." The appellate court remanded to the district court to determine whether the United States had complied with NHPA. *Id.* at 305.

On remand, the district court noted that the Army Corps of Engineers, the Federal agency responsible for the project, had entered into a Memorandum of Agreement (MOA) with the Advisory Council on Historic Preservation and the Alabama and Mississippi State Historic Preservation Officers in 1977 under the Council's regulations implementing Section 106 of NHPA.

The Corps agreed in the MOA to develop a plan for the treatment of structures meeting the National Register criteria that would be affected by the project. The Corps prepared the plan and obtained the Council's concurrence in the plan in 1983.

The court rejected plaintiffs' claim that the Corps had not complied with the provision of the MOA that required a treatment plan. First, the court determined that Section 800.6(c)(3) of the Council's regulations, which states that a ratified MOA shall evidence satisfaction of the Federal agency's responsibility under Section 106 of NHPA, creates a "presumption of compliance." 567 F. Supp. at 989-90. Even without this presumption, the court held that the Government's documents demonstrated compliance with the terms of the MOA. *Id.* at 990.

The court dismissed plaintiffs' NHPA claims and held that further action withholding possession of the condemned lands on these grounds would not be warranted. *Id.* The Fifth Circuit affirmed. 733 F.2d at 380.

The district court also found that the Corps' programmatic environmental impact statement (EIS) prepared under the National Environmental Policy Act on the entire waterway project sufficiently addressed the impacts of the project on

cultural resources. No site-specific EIS for Cedar Oaks and Barton township was needed. 567 F. Supp. at 991. The appellate court affirmed. 733 F.2d at 381.

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Case 40

***United States v. 45,149.58 Acres of Land*, 455 F. Supp. 192 (E.D.N.C. 1978).**

The United States sought to condemn land for the Air Force to use as a bombing range. There was some question as to whether buildings eligible for inclusion in the National Register of Historic Places existed on the site. The owners of the land filed a separate action against the Government, alleging that the Government had failed to comply with Section 106 of the National Historic Preservation Act (NHPA). The court consolidated the two suits, treating the owners' claims as defenses to the Government's condemnation action.

The court first noted that the landowners had failed to state a claim under NHPA upon which relief could be granted, but it nevertheless ordered the Air Force to conduct a survey of the area to ascertain whether historic sites existed and, if so, to comply with NHPA. 455 F. Supp. at 203. Furthermore, the court held that noncompliance with NHPA is not a valid defense to a condemnation action. *Id.*

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Case 143

USS Cabot *CVL 28 Assn., Inc. v. Josiah,* 1998 WL 315387 (E.D. La. 1998), Docket No. CIV. A. 98-0154.

Plaintiff, USS *Cabot* CVL 28 Association, Inc., an association of primarily U.S. Navy veterans who served on the USS *Cabot*, sought a preliminary injunction 1) ordering the Commander of the Eighth Coast Guard District to require that a Dead Ship Tow Plan be submitted to plaintiff prior to any movement of the ex-Navy aircraft carrier USS *Cabot*, a National Historic Landmark, and 2) prohibiting the Commander from approving any Dead Ship Tow Plan for the *Cabot* unless and until he has complied with the provisions of the National Historic Preservation Act (NHPA).

Following its war days, the *Cabot* was transferred to Spain and then back to the U.S. to one of the defendants, the USS *Cabot*/Dedalo Foundation, Inc., a non-profit corporation, for the purposes of converting the vessel into a museum. The ship was docked in New Orleans and then moved to Violet, Louisiana. The ship was then transferred to another one of the defendants, Global Maritime Group, LLC. The foundation entered into an agreement with Global to scrap the *Cabot.* The *Cabot* was then moved to Port Isabel, Texas.

Plaintiff then filed this lawsuit because the Foundation/Global joint venture planned to move the *Cabot* from Port Isabel to Brownsville where it would be scrapped. Plaintiff made it clear that its interest was to prevent the scrapping of the *Cabot* and that it had no particular interest in any movement of the vessel, except to the extent it would result in the vessel's demolition. Plaintiff contended that the approval of an additional Dead Ship Tow Plan by the U.S. Coast Guard, which has extensive regulatory authority, is an "undertaking" under NHPA.

The court found several serious questions in regards to the merits of plaintiff's case. As a preliminary matter, the court stated that plaintiff had not shown that, under the circumstances, the regulations required the Coast Guard to control any further movement of the *Cabot.* Any decisions on further vessel movement were left to the discretion of the District Commander and the Commander of the Port (COTP). Further, plaintiff was unable to show that conditions mandating action by the COTP currently existed. There was also a serious question as to whether the movement of the *Cabot* from Port Isabel to Brownsville would constitute an "undertaking" under NHPA.

However, the court refused to rule on this issue and decided to deny the petition for a preliminary injunction on the issue of harm to the public interest. After assuming that plaintiff had demonstrated irreparable harm, the court concluded that the potential harm to plaintiff if the injunction did issue (i.e., moving the vessel and scrapping it) did not outweigh the potential hardship to Global and the foundation if the injunction were granted (i.e., losing the vessel through capsizing or sinking in a storm due to its present location).

The court further found that the issuance of the preliminary injunction would not be in the public interest. While acknowledging that there is a public interest in the preservation of National Historic Landmarks such as the *Cabot*, the court stated that the interest of public safety posed by the current location and size of the *Cabot* was more important. In its current location, the *Cabot* posed a threat to Port Isabel in the event of a tropical storm, exposing the community to a risk of loss of life and damage to facilities and the environment.

Since plaintiff could not show that the requested preliminary injunction would not undermine the public interest, it failed to establish another of the necessary prerequisites to the issuance of a preliminary injunction, and the court denied the request.
In order to be granted a preliminary injunction, the movant must demonstrate by a clear showing that 1) there is a substantial likelihood of success on the merits; 2) there is a substantial threat of irreparable harm if the injunction is not granted; 3) the threatened injury outweighs any harm that may result from the injunction to the non-movant; and 4) the injunction will not undermine the public interest. Bypassing the first issue, and assuming the second issue in favor of

plaintiff, the court found against plaintiff regarding the third and fourth issues. The petition was, therefore, denied.

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Case 133

***Vieux Carré Property Owners, Residents &;Associates, Inc. v. Brown*, No. 87-3700 (E.D. La. Sept. 21, 1987), *aff'd in part, rev'd in part*, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990), *on remand*, No. 87 3700 (E.D. La. Aug. 15, 1990), *aff'd in part, rev'd in part*, 948 F.2d 1436 (5th Cir. 1991), *on remand*, No. 87-3700 (E.D. La. Mar. 15, 1993), *aff'd*, 40 F.3d 112 (5th Cir. 1994), *reh'g en banc denied*, 49 F.3d 730 (5th Cir. 1995).**

A preservation group brought suit against the Army Corps of Engineers, claiming that the Corps violated the National Historic Preservation Act (NHPA), the Rivers and Harbors Act (RHA), and its own regulations by allowing a local park authority to construct an aquarium and riverfront park without examining the project's potential effect on the Vieux Carré National Historic Landmark District. The Corps had not initiated the Section 106 review process, determining that activities covered by a nationwide permit were not "licensed" and thus did not constitute undertakings.

Plaintiffs sought a declaratory judgment against the Corps and an injunction to prevent the park authority from proceeding with the project. Plaintiffs claimed that the aquarium phase of the project should not proceed without a Corps permit and that an individual, as opposed to a nationwide, permit was required for the park phase. Even if the park project fell under the nationwide permit, plaintiffs argued, the nationwide permit was still a license within the meaning of NHPA and, therefore, triggered Section 106 review.

The district court dismissed the plaintiffs' challenge to the permits on jurisdictional grounds, finding that RHA did not give plaintiffs a direct right of action to compel the Corps to require permitting and that the Administrative Procedure Act (APA) did not provide for Federal court review of Corps decisions made under RHA.

The court of appeals reversed the district court's holding that Corps' permit decisions under the RHA were non-reviewable. Plaintiffs also sought review of the Corps' violation of NHPA and the Corps' own regulations, as well as RHA, the court explained. The concerns alleged by plaintiffs were well within the zone of interests protected by NHPA and the Corps' regulations, giving plaintiffs standing to sue. 875 F.2d at 458-59. However, the court of appeals concluded that plaintiffs did not have a right of action against the non Federal defendants. According to the court, neither APA nor NHPA gives a private plaintiff a right of action against non-Federal parties. *Id.* at 456. The court of appeals distinguished several court decisions allowing injunctions against non-Federal defendants when a Federal agency violates Federal law. *Id.* at 457. Acknowledging that several courts had allowed private plaintiffs to enjoin non-Federal defendants where agencies have not complied with NHPA, the court did not find explicit justification for such holdings. *Id.* at 458.

With regard to the merits of plaintiffs' challenge to the aquarium phase of the project, the court of appeals made two findings in affirming the district court's dismissal of the claim. First, it determined that neither the Corps' review of the final plans for the aquarium phase nor the monitoring of the project triggered Section 106 review. Second, the court determined that the Corps' decision not to require a permit for the aquarium phase of the project was neither arbitrary nor capricious.

On the issue of the permit for the park phase of the project, the court of appeals reversed the district court. In its ruling, the court of appeals addressed the relationship between nationwide permits and Section 106 of NHPA. The court observed that the statutory purpose of NHPA "contemplates widespread agency responsibility for the protection of historic interests." *Id.* at 465. However, the court also opined that "Congress clearly did not intend to require the Corps to subject such truly inconsequential projects to the procedural complexities of section 470f." *Id.* According to the court, "such a literal construction of section 470f is unreasonable and unintended, and as such is a result we must endeavor to avoid." *Id.* The court of appeals took a "middle path" between the Corps' position that NHPA's Section 106

undertaking requirement is coterminous with the major Federal action requirement in the National Environmental Policy Act (NEPA), and plaintiffs' argument that all activities covered by nationwide permits trigger the NHPA review process: the court held that when nationwide permits authorize "truly inconsequential" activities, they do not trigger Section 106 review. *Id.*

The court of appeals remanded the case to determine whether the park phase of the project required an individual or a nationwide permit. If it required an individual permit, then the project would be subject to Section 106 review. If it required a nationwide permit, then the district court had to determine whether the project was so inconsequential that it "escaped" Section 106 review. If it did escape Section 106 review, the district court was directed to determine whether the nationwide permit was invalid because the Corps failed to evaluate the park's impact on historic properties as required by its own regulations.

On remand, the district court dismissed the case on grounds of mootness, claiming that no relief could be granted because construction of the aquarium was virtually complete. Once again, the plaintiffs appealed, and the court of appeals reversed the district court on the mootness holding. The court of appeals favored plaintiffs' argument that the district court violated the law of the case doctrine by basing its mootness decision on assumptions about legal issues on which it was directed to rule. 948 F.2d at 1442. The Corps also argued that Section 106 review was not required for a completed project. The court of appeals, however, held that as long as the project was under a Federal license and the Corps had the ability to require changes to mitigate adverse effects, the project remained a Federal undertaking requiring review. *Id.* at 1445 (citing *Morris County Trust for Historic Preservation v. Pierce,* 714 F.2d 271, 280 (3d Cir. 1983)).

The court also rejected the district court's reasoning that allowing plaintiffs' action would "unduly penalize" the private developers. 948 F.2d at 1442. The court found that "the interests of the non-Federal developers are not an appropriate basis for concluding that Vieux Carré's suit is moot." *Id.* at 1445. The court noted that the Section 106 review process calls for consultation with all interested parties when considering mitigation options, ensuring consideration of the developer's interests. *Id.* The Corps also claimed that the case was moot because the court was no longer able to grant relief to plaintiffs due to substantial completion of the project. The court of appeals rejected that argument as well, concluding that there still could be effective relief for plaintiffs. *Id.* at 1446. The court observed that it was impossible to pre-judge the outcome of the Section 106 review process and that, conceivably, a broad range of remedies could result from the consultation process. *Id.* at 1447. According to the court, the Advisory Council on Historic Preservation, not the district court, should decide what relief is available. *Id.*

Remanding the case to the district court once again, the court of appeals directed it to make the determinations required in its previous order. If the district court again determined the case to be moot, it must inquire as to the applicability of the exception to the mootness doctrine for cases "capable of repetition, yet evading review." *Id.* at 1449.

On remand, the district court found that the park phase of the project was properly authorized under a nationwide permit and involved "truly inconsequential" navigation activities. Reviewing the case for the third time, the court of appeals affirmed the district court decision, concluding that the Corps was not arbitrary or capricious in finding a nationwide permit appropriate given the nature of the changes to the wharf. 40 F.3d at 116. Approving the district court's analysis of inconsequentiality, the court found that the district court appropriately measured inconsequentiality from the impact on navigable waters. The court found that even if the district court should have considered the consequences of its activities on the historic properties in measuring inconsequentiality, the Corps' decision was not arbitrary or capricious.

The court of appeals also determined that although the Corps did not comply with its own regulations regarding consideration of historic properties, plaintiffs did not have any remedy under RHA or the Corps' regulations. The court stated that compliance with 33 C.F.R. § 330.5(b)(9), which requires consideration of adverse effects to historic properties, is a condition to the activity licensed under the nationwide permit; if the condition is not followed, the Corps regulations provide that the permit is not valid and the project must be authorized through an individual permit. 40 F.3d at 117 (citing 33 C.F.R. §§ 330.1, 330.5(b)). Although the project therefore went forward without a valid permit in violation of Section 10 of RHA, the court nevertheless concluded that RHA did not give plaintiffs a private right of action against the Corps, nor did it require the Corps to enforce the provision violated in this case. *Id.* The

Attorney General, not the Corps, has discretionary enforcement power over such violations.

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Case 77

***Vieux Carré Property Owners, Residents, &;Associates v. Pierce*, No. 81-4777 (E.D. La. Aug. 10, 1982).**

The city of New Orleans proposed to construct, with the aid of an urban development action grant from the Department of Housing and Urban Development (HUD), a hotel and retail facility near the Vieux Carré district, a National Historic Landmark. The grant agreement was executed in 1981. Soon after, the city, as HUD's delegate under the Housing and Community Development Act (HCDA), concluded that the project would have no adverse effect on historic properties. The Advisory Council on Historic Preservation disagreed, and after an unsuccessful consultation conducted under the Council's regulations implementing Section 106 and Section 110(f) of the National Historic Preservation Act (NHPA), convened a meeting of a panel of Council members to comment on the undertaking. The panel concluded that the requirements of Section 110(f) of NHPA had been met and recommended that HUD make final approval of the grant. Plaintiffs brought this action to enjoin Phase II of the project, arguing that HUD and the city had not complied with NHPA and the National Environmental Policy Act (NEPA).

The court first determined that HUD could delegate to the city its responsibilities under Section 110(f) of NHPA just as it could its duties under Section 106 under the authority of HCDA. That Section 110(f) was added to NHPA after the enactment of the delegation provision of HCDA did not imply repeal of the delegation provision. Slip op. at 5-7.

The court next concluded that the Council's review of Phase II of the project was appropriate. The city was not obligated to ensure that later, indefinite phases of the project were included in the historic review. The city was found to have complied with Section 110(f). *Id.* at 18.

In considering plaintiffs' NEPA claims, the court concluded that the visual impacts on the historic district did not amount to such a "significant effect on the human environment" as to require an environmental impact statement. *Id.* at 14-16.

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Case 109

Village of Los Ranchos v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

Plaintiffs brought suit against the Federal Highway Administration (FHWA) alleging that it violated the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), Section 4(f) of the Department of Transportation Act, and Executive Order No. 11990 on wetlands in a dispute over the construction of two bridges across the Rio Grande River. FHWA involvement in the project consisted of providing $59 million of financial assistance for the preparation of an environmental impact statement (EIS), taking an active role in and preparing the EIS, and approving the final document. After approval of the final EIS, however, Federal involvement in the river crossing project ceased, because the State never requested Federal funding for the project itself but, instead, financed the project solely with State funds.

The Tenth Circuit's opinion focused on whether Federal involvement in the project was enough to trigger applicable statutes. The court determined that the Government was not so involved in the project as to make the project a major Federal action under NEPA or a Federal undertaking under NHPA. In holding that FHWA was not required to comply with NHPA, the court applied the same reasoning it used to find that the Federal Government's action was not a "major Federal action" triggering NEPA. 906 F.2d at 1484. Observing at the outset that Federal courts were not in agreement as to the amount of Federal involvement required to trigger NEPA, the court concluded that projects should not be deemed major Federal actions simply because they are eligible for Federal assistance.

Further, the mere preparation of an EIS for the Federal Government, including financial assistance for the study and approval of the final document, did not automatically trigger NEPA, particularly when the State voluntarily prepared an EIS when it was not legally obligated to do so. *Id.* at 1481. Finding that FHWA participation in and approval of the EIS did not render the project Federal in nature and, moreover, that the bridge project was not under the direct or indirect jurisdiction of FHWA, the court determined that the project was neither a major Federal action nor an undertaking. *Id.* at 1484.

The court also rejected plaintiffs' argument that the project was improperly segmented from the I 25/Los Angeles Interchange project, itself a major Federal action. Although the construction of the bridge was closely related physically to the Federal project, the court affirmed the district court's determination that the bridge project had a logical terminus. *Id.* at 1483. The court found Section 4(f) of the Department of Transportation Act inapplicable because no Federal funds were used for construction of the bridges. The court thus rejected plaintiffs' arguments that the Federal involvement in the EIS constituted "approval" of the project. Finally, the court concluded that Executive Order No. 11990 on wetlands did not apply to the project, because the Executive Order only imposed obligations upon Executive Branch agencies carrying out their responsibilities for land-use planning. Federal involvement in the project, the court concluded, was too insubstantial to trigger the requirements of the Executive Order.

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Case 106

Walsh v. United States Army Corps of Engineers, 757 F. Supp. 781 (W.D. Tex. 1990).

Property owners sought a preliminary injunction against the Army Corps of Engineers and the city of San Antonio after the Corps issued a permit to the San Antonio Water Board that authorized construction of Applewhite Dam and Reservoir. Construction of the dam would require inundation and destruction of plaintiffs' property, which included dozens of significant prehistoric and historic archeological sites. Despite the onset of eminent domain proceedings, plaintiffs did not agree to the city's offer to purchase their property. Plaintiffs argued that the Corps issued the permit in violation of the National Historic Preservation Act (NHPA), the Clean Water Act, and the National Environmental Policy Act (NEPA).

The court's opinion focused on the alleged NEPA and NHPA violations. In discussing the NHPA claim, the court noted that NHPA and NEPA create only procedural, not substantive rights. 757 F. Supp. at 784. Under NHPA, the court's role is to determine whether the Federal agency has followed the procedures for consultation with the Advisory Council on Historic Preservation. *Id.* Plaintiffs alleged that the Corps violated NHPA by issuing the permit before the parties signed a Programmatic Agreement.

The district court disagreed, finding that the Corps had complied with NHPA even though it issued a permit prior to signing the agreement. The court based its decision on several factors. First, the Corps appropriately surveyed, tested, and evaluated the project area and consulted with the Texas State Historic Preservation Officer (SHPO) throughout the review process. *Id.* at 787. Second, the Corps submitted four draft agreements to the Council and the SHPO and, in addition, consulted with several interested parties. Third, the Corps continued to negotiate pursuant to Section 106 even after it issued the permit. Most important, according to the court, the Corps issued the permit subject to five special conditions that called for environmental mitigative efforts. These included a restriction on the actions of the San Antonio Water Board until the Programmatic Agreement was signed. *Id.* at 788. Such a condition, the court found, was appropriate in light of 36 C.F.R. § 800.3(c) of the Council's regulations, which does not prohibit phased compliance with Section 106 at different stages in planning, nor does it bar an agency from authorizing nondestructive planning activities preparatory to an undertaking. 757 F. Supp. at 789.

In regard to the NEPA and Clean Water Act claims, plaintiffs alleged that the Corps failed to analyze the project's cumulative impacts with other reasonably foreseeable future actions. *Id.* at 785. The court explained that the cumulative impacts of actions proposed, not merely contemplated, must be considered under NEPA. *Id.* at 786. Further, the court pointed to the Council on Environmental Quality's regulations which state that a proposal exists when the agency is preparing to make a decision, and the effects thereof can be meaningfully evaluated. *Id.* (citing 40 C.F.R. § 1508.23 (1989)). Applying the above definitions, the court found that the Corps was simply contemplating future reservoirs, not proposing such future actions. To support this conclusion, the court observed that the city Water Board had not applied for permits, there was no evidence of detailed planning for potential sites, and the project was approved and financed separately by the city of San Antonio without consideration of any other potential reservoirs. *Id.* at 785.

The court also rejected plaintiffs' Clean Water Act claim, finding that the Corps had properly evaluated the probable impacts of the project and had balanced its public benefits against its reasonably foreseeable detriments. *Id.* at 786.

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Case 16

Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974).

In this case, plaintiffs sought to enjoin construction of the Warm Springs Dam, alleging that the Army Corps of Engineers had failed to discuss adequately in its environmental impact statement (EIS) prepared under the National Environmental Policy Act (NEPA) the effects of the dam on archeological resources in the area and had violated Executive Order No. 11593 by failing to conduct a thorough archeological survey of the project area. Soon after the project was authorized in 1962, the Corps had commissioned an archeological survey that was later determined to be inadequate. Although the Corps had expressed its intent to conduct further surveys and the EIS, completed in 1973, discussed the need for further surveys, the Corps had not begun these surveys at the time of the lawsuit. After the EIS was done and the Corps had called for and received bids for construction, the Secretary of the Interior determined that there was an archeological district that was eligible for the National Register of Historic Places within the area of the dam's impact.

The court rejected plaintiffs' challenge to the EIS, finding that although the EIS's discussion of archeological resources had its shortcomings, the Corps had demonstrated that it could proceed with the project and yet avoid harm to the archeological sites. The EIS had stimulated a full examination of the archeological sites sufficient to apprise the decisionmakers of the effects of the project on the sites. 378 F. Supp. at 250-51. Nevertheless, the court continued by finding that compliance with NEPA does not constitute compliance with Executive Order No. 11593. Because the Secretary of the Interior had found the archeological district to be eligible for the Register, the Corps must comply with the requirements of Section 2(b) of the Executive Order. That section required the Corps to reconsider the project and, if it proposed to alter the eligible property substantially, to afford the Advisory Council on Historic Preservation an opportunity to comment first. *Id.* at 251.

The court denied plaintiffs' motion for a preliminary injunction but ordered that the archeological sites not be disturbed until the completion of any appropriate mitigative measures specified by the Council and the State Historic Preservation Officer. *Id.* at 251-52. [Ed. note: The court did not explain why it crafted the remedy in this way.]

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Case 68

WATCH v. Harris, 603 F.2d 310 (2d Cir.) *cert. denied*, 444 U.S. 995 (1979), *fees awarded*, 535 F. Supp. 9 (D. Conn. 1981).

This action concerned an ongoing urban renewal project that proposed demolition of 83 buildings of historic interest in the downtown area of Waterbury, Connecticut. At the time the action was filed, many of the buildings scheduled for demolition had been destroyed, but some remained standing. The project was funded through a Department of Housing and Urban Development (HUD) loan and capital grant contract executed in 1973. The contract provided for work to be done in phases, each of which would require HUD's approval. Thus, demolition of the buildings required HUD's approval.

In May 1976, the grant recipient, the local redevelopment agency, forwarded to HUD the environmental information required under HUD's procedures, concluding that the project area contained no known significant historic properties listed in or being considered for nomination to the National Register of Historic Places. On the basis of this information, HUD concluded in its environmental review that there were no listed or nominated properties in the area and declined to prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). HUD did not consult with the State Historic Preservation Officer (SHPO) or the Advisory Council on Historic Preservation and did not consider alternatives to demolition.

After HUD's environmental review was complete, the local agency sent HUD information on the potential eligibility of a carriage house in the project area, a structure that local citizens had pointed out to the SHPO as worthy of nomination to the Register. Although HUD believed that the carriage house was not eligible, it nevertheless requested a formal determination of eligibility for the Register from the Secretary of the Interior and ordered that no federally assisted activity occur on any structure in the project area until HUD could make a Register eligibility determination for the structure. In February 1978, the Keeper of the Register determined that the carriage house was eligible. Meanwhile, the Council and the SHPO both wrote to HUD suggesting that HUD evaluate the historic significance of the entire downtown district. In September 1978, HUD abandoned its historic review efforts and recommended that demolition of the buildings recommence.

Plaintiff, a citizens' organization, alleged that HUD had not complied with NEPA, the National Historic Preservation Act (NHPA), and certain regulations of HUD and the Council.

The district court held that plaintiff had standing to sue, a decision not challenged on appeal, and that laches did not bar the action because the buildings had not been demolished. The Second Circuit agreed, noting the public interest in preserving historic sites and the continuing nature of HUD's supervision over the project. 603 F.2d at 315-16.

The district court also held that the granting of approval for acquisition or demolition of a property is a "major Federal action" and that NEPA would apply as long as HUD had significant control over the project. Whenever new information, such as the potential eligibility of the carriage house, comes to light, HUD must again determine whether an EIS is necessary. If HUD should decide that Register-eligible properties would be affected, a detailed EIS would then be required. The Second Circuit agreed. *Id.* at 318, 326.

Addressing plaintiff's contention that HUD should have complied with Section 106 of NHPA, the appellate court, reversing the district court, found that the execution of the grant contract did not constitute final approval because the contract provided for subsequent approval in stages. The provisions of NHPA do not cease to apply simply because an agency has given preliminary approval for expenditures, but continue to apply until the agency has finally approved the expenditures of funds at each stage of the undertaking. *Id.* at 319. The court discussed at length the legislative history of NHPA, *id.* at 320-25, and found support for its decision in the Council's regulations implementing Section 106. *Id.* at 324. The court held that HUD must comply with Section 106 as long as HUD retained the authority to make

funding approvals under the grant contract. Because HUD had not approved all stages of funding at the time the carriage house was determined to be eligible for the Register, HUD should have complied with Section 106. *Id.* at 326.

Subsequently, the parties undertook the consultation process established by the regulations of the Advisory Council on Historic Preservation implementing Section 106 of the National Historic Preservation Act (NHPA) and entered into a Memorandum of Agreement (MOA), which was signed on December 8, 1980. The district court dissolved its previously issued preliminary injunction in February 1981. Plaintiff then sought attorneys' fees and expenses under Section 305 of NHPA.

The threshold decision facing the district court was whether the case was "pending" on the effective date of the enactment of the attorneys' fees provision of NHPA, December 12, 1980, at which time all of the litigation had been completed and the MOA signed by all parties. The court concluded that the case was pending and that plaintiff could recover for services rendered during the entire controversy unless retroactive application of the attorneys' fees provision might result in "manifest injustice."

To determine if there was a possibility of injustice, the court looked to three factors: (1) the nature and identity of the parties, (2) the nature of the rights affected by the retroactive application of the law, and (3) the impact of changes in law upon existing rights or the possibility that new and unanticipated obligations could be imposed upon parties without notice or opportunity to be heard. 535 F. Supp. at 12. The court concluded that none of these concerns were applicable in this case because plaintiff had done a substantial service in protecting historic properties, the local agency had no unconditional rights to the public funds, and application of the attorneys' fees amendment did not change the defendants' obligations to comply with Federal statutes. *Id.* at 12-13.

Next, the court determined that plaintiff was an "interested person" who "substantially prevailed" in the action. *Id.* at 13.

The court then concluded that attorneys' fees could be levied against both the Federal and local Government defendants. The court rejected the Federal defendant's argument that attorneys' fees were prohibited by the doctrine of sovereign immunity, citing the legislative history of NHPA and the Equal Access to Justice Act. *Id.* at 13-14. Section 305 of NHPA applies to any local government that receives Federal money and can be said to be a "partner" with the Federal Government in the venture at issue. *Id.* at 14. That the State contributed funds to the city does not bar the award of attorneys' fees. The local government was not "an arm of the State" immune from suit under the Eleventh Amendment of the United States Constitution, but even if it were, the Eleventh Amendment would not bar an award of attorneys' fees when, as in this case, the fees are sought by a plaintiff who has secured prospective relief against State officials. *Id.* at 15.

Finally, to determine the amount of fees to award, the court considered the time and labor spent, counsel's experience and reputation, and the magnitude and complexity of the litigation. *Id.* The court awarded fees but reduced plaintiff's request because it found the requested fees to be excessive. The court ordered that responsibility for the fees was to be shared equally between the Federal and local agencies. *Id.* at 16.

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Case 116

Waterford Citizens' Association v. Reilly, 970 F.2d 1287 (4th Cir. 1992).

In the early 1970s, the Environmental Protection Agency (EPA) funded the construction of a sewer system in Waterford, Virginia, a National Historic Landmark District. Because the project would have an adverse effect on the landmark district, EPA entered into a Memorandum of Agreement (MOA) with the Advisory Council on Historic Preservation and the Virginia State Historic Preservation Officer (SHPO) in which EPA agreed to mitigate the effects of the project. The MOA specifically required that any revision in the final plan for the sewer system must be submitted to the SHPO. Twelve years after the project had been completed, a developer requested the Loudon County Sanitation Authority to connect new sewer lines for a proposed townhouse development to Waterford's existing sewer system. The Sanitation Authority did not request additional grant money from EPA, nor did it consult with the SHPO before approving the developer's request.

The Council and the SHPO viewed the proposed hookup as a change in the sewer system plan. They requested that EPA comply with the terms of the MOA and direct the Sanitation Authority to submit the proposed changes to the SHPO, thus reopening the Section 106 review process. When EPA refused to honor the request, the Waterford Citizens' Association brought suit, arguing that the MOA remained in effect after the completion of the project.

The court of appeals found that under the organizational standing doctrine, the Citizens' Association had a sufficient stake in the outcome of the case to bring suit. 970 F.2d at 1290. The court also acknowledged that once an agency signs an MOA, it assumes an obligation that is enforceable. *Id.* at 1292. In interpreting the Waterford MOA, however, the court found that EPA's obligations under the MOA were extinguished once the project was complete. Neither EPA's assumption of obligations in the MOA nor its opportunity to exercise authority as stated in the MOA constituted undertakings, the court explained. According to the court, once construction was complete, there was no longer an undertaking. *Id.* The court held that the EPA was not obligated to comply with Section 106.

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Case 41

Weintraub v. Rural Electrification Administration, 457 F. Supp. 78 (M.D. Pa. 1978).

The Pennsylvania State Historic Preservation Officer and a private plaintiff alleged that the Rural Electrification Administration (REA) of the Department of Agriculture and two private corporations had violated Section 106 of the National Historic Preservation Act (NHPA) in planning and beginning demolition of the Telegraph Building, listed in the National Register of Historic Places. The building was owned by the two private corporations, which in turn were owned by cooperatives composed of utility companies that had borrowed money from REA. Although REA had not approved use of the loan funds for the proposed demolition and no Federal funds had been used or allocated for demolition, the cooperatives had used surplus funds from the loans to lend money to the corporations for the project.

The court denied plaintiffs' motion for a temporary restraining order. In considering plaintiffs' motion for a preliminary injunction, the court first found that the considerable interests involved in the preservation of historic resources put the question beyond the jurisdictional amount specified in 28 U.S.C. § 1331(a) and that the court therefore had subject matter jurisdiction over the case. 457 F. Supp. at 87. The court also concluded that it had jurisdiction over the private defendants because of their association with REA. *Id.* at 87-88.

Second, the court held that plaintiffs had standing to assert their claims. Plaintiffs had alleged that they or their members resided near the Telegraph Building and that the cultural and aesthetic well-being of the area would be damaged by demolition of the building. The court found that plaintiffs' interests were within the zone of interests intended for protection by NHPA. *Id.* at 88.

The primary issue in the case, however, was whether there was sufficient Federal involvement in the demolition of the building to warrant application of Section 106. The court denied plaintiffs' motion for a preliminary injunction, finding that Congress intended only to control direct Federal spending and not to reach every effect of Federal spending when it made Section 106 applicable to the "approval of the expenditure of any Federal funds." The connection between the Federal spending and the action in this case was found to be too remote. *Id.* at 91. Furthermore, REA's requirement that its borrowers receive its approval of plans for construction of certain buildings and REA's right to control the expenditures of surplus funds did not amount to a "license" within the meaning of Section 106. Rather, "license" refers to a "written document constituting a permission or right to engage in some governmentally supervised activity." *Id.* at 92.

Therefore, the court concluded that NHPA did not apply to demolition of the Telegraph Building. *Id.* at 93.

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Case 124

West Branch Valley Flood Protection Association v. Stone, 820 F. Supp. 1 (D.D.C. 1993).

A nonprofit association sued the United States Army Corps of Engineers (Corps) alleging violations of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) as a result of the Corps' construction of dikes and levees to protect the city of Lock Haven, Pennsylvania, from flooding. Planning for the project began in the mid-1970s when the Corps developed an environmental impact statement (EIS) proposing various alternative flood protection measures. The Corps periodically refined the original project as new information developed and, in 1980, supplemented the EIS.

In 1987, the Corps changed the design of the levee, conducted an environmental assessment (EA) of the project's impact, and made a finding of no significant impact. The Corps published a second EA in 1990 addressing changes in the levee alignment intended to avoid a hazardous waste site and, once again, made a finding of no significant impact. The Corps additionally published a supplemental information document to clarify environmental decisions involved in the project. As part of its environmental review process, the Corps also conducted eight studies of the archeological resources in that area and entered into a Memorandum of Agreement (MOA) with the Pennsylvania State Historic Preservation Office (SHPO), the Advisory Council on Historic Preservation, and the local flood protection authority.

Plaintiffs' NEPA argument focused on the Corps' decision not to supplement the 1975 EIS as required by the regulations implementing NEPA where there are "substantial changes to the proposed action or significant new circumstances." 820 F. Supp. at 5 (citing 40 C.F.R. § 1502.9(c)(1)). The court found that the Corps' decision not to supplement the EIS was neither arbitrary nor capricious. Reviewing the numerous studies conducted by the Corps during the lengthy planning for the project, it found that the studies did not pose "significant new information" warranting a supplemental EIS. *Id.* at 7.

In a related NEPA argument, plaintiffs alleged that the EIS process had to be reopened because the Corps altered the mitigation plan. The court disagreed, finding NEPA to be satisfied as long as mitigation measures are sufficiently discussed in the EIS to demonstrate agency consideration of the project's adverse impacts. If the EIS sufficiently described the measures and the changes were not substantial, the agency might adopt a modified mitigation plan. *Id.* at 8-9. Similarly, the court found that an EIS need not be supplemented even if it is shown that an agency did not consider every possible reasonable alternative. The court noted that the Corps had considered approximately 60 project combinations before selecting the preferred alternative. *Id*. at 9.

With regard to the NHPA claim, the court also ruled in favor of the Corps. Plaintiffs argued that although the Corps had entered into an MOA which provided a mitigation plan, the MOA was no longer valid because the Corps failed to amend the MOA when new data arose. The court examined the Council's regulations and determined that they did not require an MOA to be updated as new information developed and noted that the regulations allowed for but did not mandate amendment of an MOA. *Id.* at 10.

Further, the court observed that while MOAs are strongly encouraged, the regulations do not require their formulation. Because the Corps had conducted multiple archeological studies, consulted with the Council and the SHPO, and entered into a valid MOA to address the project's impact, the court found that the purposes of NHPA had been fulfilled. *Id.*

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Case 157

Western Mohegan Tribe and Nation v. New York, 100 F.Supp.2d 122 (N.D.N.Y. 2000).

Plaintiffs, Western Mohegan Tribe and Nation, et al., sued the State of New York, alleging that the State's construction of a proposed State park violated the Native American Graves Protection and Repatriation Act (NAGPRA), the National Historic Preservation Act (NHPA), and the First Amendment of the Constitution. Plaintiffs sought a preliminary injunction against the State. There were no Federal defendants. The court not only denied plaintiffs' motion for the injunction, but also dismissed the case *sua sponte.*

Plaintiffs, a non-federally recognized tribe, contended that the site of the proposed park was of religious and cultural significance to the tribe.

The court first dismissed the NAGPRA claim. It noted that NAGPRA only applies to "Federal" and "tribal" lands. Although the Federal Government owns a nearby parcel of land, placed under the jurisdiction of the Corps of Engineers ("Corps"), such parcel is not part of the proposed park. And, even though the Corps issued a permit to defendants to allow construction activities, and gave a license to the State allowing it to be present on the Federally owned parcel, such actions did not transform the park land into "Federal" land. The court also found that there could be no feasible claim that the park area comprised "tribal" land. Finally, the court also stated that NAGPRA applied to cultural and funerary objects already possessed or under the control of a Federal agency or museum, or to those already discovered or excavated. The State had not seen any indication of Native American artifacts.

The court proceeded to dismiss NHPA claim. The court noted that local actions fell beyond the scope of NHPA. Regarding the permit issued by the Corps (who was not a defendant), the court found that it merely allowed the State access to the contiguous Federal property and did not extend Corps jurisdiction over the park site. Furthermore, even though it was a "permit," it was not legally required. Finally, in a two-sentence dicta, the court indicated that even if the permit was required, NHPA "clearly contemplates a federal funding requirement," and "[t]he Park simply is not 'funded in whole or in part under the direct or indirect jurisdiction of a Federal agency.'"

Finally, the court also dismissed the First Amendment allegation. Plaintiffs claimed that the State's proposed fees for access to the island where the park would be sited would violate their Free Exercise Rights. The court found that plaintiffs had no standing since they could not prove that they were Native Americans or descendants of the original tribe of the island where the park would be located. Accordingly, the fee imposed no cognizable injury to plaintiffs. Among other things, the court noted that plaintiffs' application for recognition as a tribe had been rejected by the Bureau of Indian Affairs "due to significant deficiencies, unverifiable statements, doctored original documents, and significant omissions in all areas required" by the regulations. The court also cited as persuasive an archeologist's affidavit stating that the Mahicans—a tribe with no cultural links to the Mohegans, and actually hostile to them—occupied the island.

Finding no jurisdiction over the NAGPRA and NHPA claims, and a lack of standing by plaintiffs regarding the First Amendment claim, the court dismissed the entire case *sua sponte.*

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Case 69

White v. Shull, 520 F. Supp. 11 (S.D.N.Y. 1981).

Plaintiffs sought to remove the village of Tuxedo Park, New York, from the National Register of Historic Places. Plaintiffs argued that the village did not meet the criteria for the Register and that the Keeper of the Register, an official in the National Park Service of the Department of the Interior, had not complied with certain administrative procedures in listing the village.

The Keeper's regulations required persons wishing to have properties removed from the Register to submit information to the Keeper through the State Historic Preservation Officer or Federal representative. Because plaintiffs had not done this, the court found that plaintiffs had failed to exhaust their administrative remedies. 520 F. Supp. at 13-14. The court rejected plaintiffs' claim that relief should be granted because the Keeper's regulations did not set forth the administrative mechanism to be followed if errors were found in the nomination process. *Id.* at 14. The court also rejected plaintiffs' claims that administrative review would be futile. *Id.* at 15.

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Case 78

Wicker Park Historic District Preservation Fund v. Pierce, 565 F. Supp. 1066 (N.D. Ill. 1982).

Plaintiffs challenged the Department of Housing and Urban Development's (HUD) processing and approval of a proposed federally subsidized rental housing project, part of which was to be constructed on lots within the Wicker Park Historic District. As required by the regulations of the Advisory Council on Historic Preservation implementing Section 106 of the National Historic Preservation Act (NHPA), HUD had submitted to the Council a determination of no adverse effect, and the Council had concurred in this determination. The agency had prepared both normal and special environmental clearances under its regulations implementing the National Environmental Policy Act (NEPA). The court denied plaintiffs' motion for a temporary restraining order.

On the merits of the case, the court examined the agency's administrative record and concluded that HUD had satisfied its statutorily mandated duties to consider both positive and negative effects of the proposed project on the historic district. 565 F. Supp. at 1074. The court rejected plaintiffs' claims that HUD had failed to submit to the Council adequate information on possible modifications of the project and failed to consider either alternative sites for construction or such different housing proposals as rehabilitation, finding that the Council's regulations impose no such duties on HUD in the absence of a finding of adverse effect. *Id.* at 1075.

In addition, the court rejected plaintiffs' argument that HUD had violated Executive Order No. 11593 by failing to institute or use procedures for the enhancement and protection of historic properties. Although HUD itself had not drafted its own regulations to administer the Executive Order it had adopted and used the Council's procedures. HUD's compliance with the Council's regulations fulfilled its duties under Executive Order No. 11593. *Id.* at 1076.

Next, noting that the Federal Government had in the past built housing projects within the historic district that had been insensitive to the historic character of the district, the plaintiffs argued that HUD's current action constituted a continuing encroachment on the historic district and created incentives for the demolition of historic structures. The court found this argument to be without merit. NHPA does not prohibit new construction in a historic district just because past construction has been poorly done, especially where, as in this case, the proposed construction was to occur on vacant land and involved no demolition of existing buildings and the prior construction had taken place before the area was designated a historic district. The court also failed to see a connection between Federal funding of new construction on vacant land and the possible future demolition of historic structures within the area. *Id.*

Finally, plaintiffs challenged the adequacy of HUD's compliance with NEPA, alleging that the agency's environmental review failed to consider the impact of the project on the historic district, to consider reasonable alternatives, or to create a reviewable record for HUD's determination of no adverse effect. Viewing HUD's historic review as part of the environmental clearance process, the court held that HUD had adequately considered the impact of the project on the historic district. *Id.* at 1078.

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Case 85

Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

Plaintiffs sought to prevent the Secretary of Agriculture, through the Forest Service, from authorizing expansion of the Snow Bowl ski area in the Coconino National Forest in Arizona. Plaintiffs claimed that mountains in the area, the San Francisco Peaks, were eligible for the National Register of Historic Places because of their historic association with Native American religious activities and that the proposal would affect two nearby properties listed in the National Register, the Fern Mountain Ranch and the C. Hart Merriam Base Camp. Plaintiffs argued that the Forest Service was required to comply with the National Historic Preservation Act (NHPA) before approving the changes to the facility. The district court granted partial summary judgment for defendants on all counts except those based on NHPA. On that issue, the court remanded to the Forest Service for compliance with the statute and the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA.

After the Forest Service consulted with the State Historic Preservation Officer (SHPO) and conducted archeological surveys of 35 percent of the permit area, it concluded that the project area contained no historic properties, the project would not affect the historic qualities of the ranch and camp, and the peaks were not eligible for the National Register. The SHPO concurred. The Forest Service did not request a formal determination of eligibility for the peaks from the Secretary of the Interior because the Forest Service and the SHPO had agreed that the peaks were not eligible, although for different reasons.

The D.C. Circuit affirmed the district court's subsequent dismissal of the action. First, the court found that the partial surveys conducted the Forest Service were sufficient. The Council's regulations do not require agencies to survey 100 percent of the impact area, and the scope of a survey varies from case to case. A complete survey is not necessary when the partial survey and other evidence indicate that a complete survey would be fruitless. 708 F.2d at 754.

Second, the court upheld the Forest Service's determination of no effect on the ranch and the camp. The Council's criteria of adverse effect apply only to those characteristics of a property that qualify it for inclusion in the National Register. *Id.* at 755.

Plaintiffs asserted that a question existed under Section 800.4(a)(3) of the Council's regulations as to the eligibility of the peaks. The court disagreed, finding that a question exists only when the agency and the SHPO disagree as to the eligibility of a property or the agency determines that a question exists. Because neither circumstance occurred here, there was no need to seek a formal determination of eligibility from the Secretary of the Interior. That the Forest Service and the SHPO used different reasoning in reaching the same conclusion was immaterial. *Id.* at 756.

Finally, plaintiffs challenged the substance of the Forest Service's finding that the peaks were ineligible for the Register, arguing that other similar mountains in the area had been determined to be eligible. The court sustained the agency's determination, finding no evidence of abuse of discretion. *Id.*

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Case 117

Yerger v. Robertson, 981 F.2d 460 (9th Cir. 1992).

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision that the United States Forest Service did not violate the National Historic Preservation Act (NHPA) when it declined to renew a special use permit for a recreational facility and food concession in Prescott National Forest in Arizona. In declining to renew the permit, the Forest Service ordered the concessionaire to remove historic concession buildings from the property; however, the order specified that the buildings should not be removed until the Forest Service completed the Section 106 consultation process.

Yerger, the concessionaire, alleged that the Forest Service failed to comply with NHPA when it refused his request for permit renewal before completing the Section 106 consultation process. He also argued that the Forest Service had directed him to remove the buildings as a consequence of the permit denial, an activity which would impact the property's historic character.

The court concluded that the Forest Service's failure to renew the permit constituted nothing more than its reassumption of title or control, an exercise of ownership rights that would not affect historic properties. 981 F.2d at 465. According to the court, the Forest Service directive to remove concession buildings on the property properly stipulated that the buildings should not be removed until the agency completed the Section 106 consultation process.

Citing Council regulations, the court reasoned that NHPA does not bar agencies from authorizing nondestructive planning activities before completion of consultation. *Id*. (citing 36 C.F.R. § 800.3(c)).

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Case 158

Young v. General Services Administration, 99 F.Supp. 59 (D.D.C. 2000).

As unsuccessful bidders for a Federal building project and as neighboring residents, plaintiffs brought action against the General Services Administration (GSA) under the National Environmental Policy Act (NEPA) challenging the adequacy of the Environmental Impact Statement prepared for the project. Plaintiffs also claimed GSA had violated NHPA by failing to 1) examine the impacts on historic properties adequately and avert such impacts; and 2) prevent the destruction of a historic property by the successful bidder. The successful bidder intervened in the case. The parties filed cross-motions for summary judgment. The court ruled in favor of GSA and the intervenor, granting their motions for summary judgment.

Regarding the NEPA claims, the district court held that GSA was not required to consider the unsuccessful bidder's alternative scenario for the proposed project. Such alternative simply did not meet all of the requirements in GSA's solicitation for offers. The court also found that GSA's reliance on the State department of transportation's studies to determine the impact of the project on traffic was a reasonable means to satisfy the "hard look" requirement of NEPA.

The court proceeded to analyze plaintiffs' NHPA claim. Plaintiffs argued that GSA violated NHPA by failing to prevent the successful bidders from destroying a historic roundhouse located on the site of the proposed building project. However, the court first noted that GSA was fully cognizant of the requirements of Section 110(k) of NHPA. Section 110(k) prohibits Federal agencies from providing grants, loans, permits, or other assistance to any applicant who, with the intent to avoid the requirements of Section 106 of NHPA, destroys a historic property, unless the agency consulted with the Advisory Council on Historic Preservation (Council) to determine whether such assistance was nevertheless justified. Once the property was demolished, the Council told GSA that GSA had to determine whether the bidder had destroyed the property with the intent to avoid the requirements of Section 106.

GSA not only determined such an intent was not present, but also that circumstances justified keeping the bidder despite the destruction of the property. The property owner had been working since 1988 to secure a master plan for the property, which included demolition of the historic property. The record supported the contention that the historic property was scheduled for demolition in the early 1990s, long before the Federal project in this case existed. The record also indicated that in 1995 the city of Alexandria, Virginia, required photos of the historic property "prior to the planned private demolition under its city's archeology ordinance."

The court therefore agreed with GSA, and concluded that the demolition was not intended to avoid Section 106 requirements, and therefore not in violation of the provisions of Section 110(k).

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EXECUTIVE ORDER NO. 11593

PROTECTION AND ENHANCEMENT OF THE CULTURAL ENVIRONMENT

Ex. Ord. No. 11593, May 13, 1971, 36 F.R. 8921, provided:

By virtue of the authority vested in me as President of the United States and in furtherance of the purposes and policies of the National Environmental Policy Act of 1969 (83 Stat. 852, 42 U.S.C. 4321 et seq.), the National Historic Preservation Act of 1966 (80 Stat. 915, 16 U.S.C. 470 et seq.), the Historic Sites Act of 1935 (49 Stat. 666, 16 U.S.C. 461 et seq.), and the Antiquities Act of 1906 (34 Stat. 225, 16 U.S.C. 431 et seq.), it is ordered as follows:

Section 1. Policy. The Federal Government shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation. Agencies of the executive branch of the Government (hereinafter referred to as 'Federal agencies') shall (1) administer the cultural properties under their control in a spirit of stewardship and trusteeship for future generations, (2) initiate measures necessary to direct their policies, plans and programs in such a way that federally owned sites, structures, and objects of historical, architectural or archaeological significance are preserved, restored and maintained for the inspiration and benefit of the people, and (3), in consultation with the Advisory Council on Historic Preservation (16 U.S.C. 470i), institute procedures to assure that Federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures and objects of historical, architectural or archaeological significance.

Sec. 2. Responsibilities of Federal agencies. Consonant with the provisions of the acts cited in the first paragraph of this order, the heads of Federal agencies shall:

(a) no later than July 1, 1973, with the advice of the Secretary of the Interior, and in cooperation with the liaison officer for historic preservation for the State or territory involved, locate, inventory, and nominate to the Secretary of the Interior all sites, buildings, districts, and objects under their jurisdiction or control that appear to qualify for listing on the National Register of Historic Places.

(b) exercise caution during the interim period until inventories and evaluations required by subsection (a) are completed to assure that any federally owned property that might qualify for nomination is not inadvertently transferred, sold, demolished or substantially altered. The agency head shall refer any questionable actions to the Secretary of the Interior for an opinion respecting the property's eligibility for inclusion on the National Register of Historic Places. The Secretary shall consult with the liaison officer for historic preservation for the State or territory involved in arriving at his opinion. Where, after a reasonable period in which to review and evaluate the property, the Secretary determines that the property is likely to meet the criteria prescribed for listing on the National Register of Historic Places, the Federal agency head shall reconsider the proposal in light of national environmental and preservation policy. Where, after such reconsideration, the Federal agency head proposes to transfer, sell, demolish or substantially alter the property he shall not act with respect to the property until the Advisory Council on Historic Preservation shall have been provided an opportunity to comment on the proposal.

(c) initiate measures to assure that where as a result of Federal action or assistance a property listed on the National Register of Historic Places is to be substantially altered or demolished, timely steps be taken to make or have made records, including measured drawings, photographs and maps, of the property, and that copy of such records then be deposited in the Library of Congress as part of the Historic American Buildings Survey or Historic American Engineering Record for future use and reference. Agencies may call on the Department of the Interior for advice and technical assistance in the completion of the above records.

(d) initiate measures and procedures to provide for the maintenance, through preservation, rehabilitation, or restoration, of federally owned and registered sites at professional standards prescribed by the Secretary of the Interior.

(e) submit procedures required pursuant to subsection (d) to the Secretary of the Interior and to the Advisory Council on Historic Preservation no later than January 1, 1972, and annually thereafter, for review and comment.

(f) cooperate with purchasers and transferees of a property listed on the National Register of Historic Places in the development of viable plans to use such property in a manner compatible with preservation objectives and which does not result in an unreasonable economic burden to public or private interests.

Sec. 3. Responsibilities of the Secretary of the Interior. The Secretary of the Interior shall:

(a) encourage State and local historic preservation officials to evaluate and survey federally owned historic properties and, where appropriate, to nominate such properties for listing on the National Register of Historic Places.

(b) develop criteria and procedures to be applied by Federal agencies in the reviews and nominations required by section 2(a). Such criteria and procedures shall be developed in consultation with the affected agencies.

(c) expedite action upon nominations to the National Register of Historic Places concerning federally owned properties proposed for sale, transfer, demolition or substantial alteration.

(d) encourage State and Territorial liaison officers for historic preservation to furnish information upon request to Federal agencies regarding their properties which have been evaluated with respect to historic, architectural or archaeological significance and which as a result of such evaluations have not been found suitable for listing on the National Register of Historic Places.

(e) develop and make available to Federal agencies and State and local governments information concerning professional methods and techniques for preserving, improving, restoring and maintaining historic properties.

(f) advise Federal agencies in the evaluation, identification, preservation, improvement, restoration and maintenance of historic properties.

(g) review and evaluate the plans of transferees of surplus Federal properties transferred for historic monument purposes to assure that the historic character of such properties is preserved in rehabilitation, restoration, improvement, maintenance and repair of such properties.

(h) review and comment upon Federal agency procedures submitted pursuant to section 2(e) of this order.

Richard Nixon.

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Executive Order No. 13006:
Locating Federal Facilities on Historic Properties in Our Nation's Central Cities

May 21, 1996

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the National Historic Preservation Act (16 U.S.C. 470 et seq.) and the Public Buildings Cooperative Use Act of 1976 (90 Stat. 2505), and in furtherance of and consistent with Executive Order No. 12072 of August 16, 1978, and Executive Order No. 11593 of May 13, 1971, it is hereby ordered as follows:

Section 1. Statement of Policy. Through the Administration's community empowerment initiatives, the Federal Government has undertaken various efforts to revitalize our central cities, which have historically served as the centers for growth and commerce in our metropolitan areas. Accordingly, the Administration hereby reaffirms the commitment set forth in Executive Order No. 12072 to strengthen our Nation's cities by encouraging the location of Federal facilities in our central cities. The Administration also reaffirms the commitments set forth in the National Historic Preservation Act to provide leadership in the preservation of historic resources, and in the Public Buildings Cooperative Use Act of 1976 to acquire and utilize space in suitable buildings of historic, architectural, or cultural significance.

To this end, the Federal Government shall utilize and maintain, wherever operationally appropriate and economically prudent, historic properties and districts, especially those located in our central business areas. When implementing these policies, the Federal Government shall institute practices and procedures that are sensible, understandable, and compatible with current authority and that impose the least burden on, and provide the maximum benefit to, society.

Section 2. Encouraging the Location of Federal Facilities on Historic Properties in Our Central Cities. When operationally appropriate and economically prudent, and subject to the requirements of Section 601 of title Vi of the Rural Development Act of 1972, as amended (42 U.S.C. 3122), and Executive Order No. 12072, when locating Federal facilities, Federal agencies shall give first consideration to historic properties within historic districts. If no such property is suitable, then Federal agencies shall consider other developed or undeveloped sites within historic districts. Federal agencies shall then consider historic properties outside of historic districts, if no suitable site within a district exists. Any rehabilitation or construction that is undertaken pursuant to this order must be architecturally compatible with the character of the surrounding historic district or properties.

Section 3. Identifying and Removing Regulatory Barriers. Federal agencies with responsibilities for leasing, acquiring, locating, maintaining, or managing Federal facilities or with responsibilities for the planning for, or managing of, historic resources shall take steps to reform, streamline, and otherwise minimize regulations, policies, and procedures that impede the Federal Government's ability to establish or maintain a presence in historic districts or to acquire historic properties to satisfy Federal space needs, unless such regulations, policies, and procedures are designed to protect human health and safety or the environment. Federal agencies are encouraged to seek the assistance of the Advisory Council on Historic Preservation when taking these steps.

Section 4. Improving Preservation Partnerships. In carrying out the authorities of the National Historic Preservation Act, the Secretary of the Interior, the Advisory Council on Historic Preservation, and each Federal agency shall seek appropriate partnerships with States, local governments, Indian tribes, and appropriate private organizations with the goal of enhancing participation of these parties in the National Historic Preservation Program. Such partnerships should embody the principles of administrative flexibility, reduced paperwork, and increased service to the public.

Section 5. Judicial Review. This order is not intended to create, nor does it create, any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

William J. Clinton

The White House
May 21, 1996

Updated April 30, 2002

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ADVISORY COUNCIL ON HISTORIC PRESERVATION

The Advisory Council on Historic Preservation promotes the preservation, enhancement, and sustainable use of our nation's diverse historic resources, and advises the President and the Congress on national historic preservation policy.

Preserving America's Heritage[sm]

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ACHP and CEQ Release Handbook on Coordination of Important Federal Processes

Today, the White House Council on Environmental Quality and the ACHP released a handbook designed to help coordinate required review processes under the National Historic Preservation Act and the National Environmental Policy Act. The handbook stands to significantly improve the coordination of environmental reviews across the government. This handbook provides practical advice to practitioners and stakeholders to improve the efficiency and effectiveness of federal agencies' environmental review.

Read the press release.

Read the handbook.

Read more from CEQ and the ACHP about this important guidance.

ACHP Business Meeting Provides Plenty of Preservation News

Members of the ACHP met March 1 to pass resolutions, discuss the 50th anniversary of the NHPA, swear in new members, and discuss plenty of historic preservation initiatives and news. Read the highlights of the business meeting.

Secretary of the Interior Presents Awards at Winter Meeting



Secretary Ken Salazar today presented the Department of the Interior's 2012 Historic Preservation Awards and administered the oath of office to s of the Advisory Council on Historic Preservation (ACHP). Read more

ACHP Endorses Plan to Support U.N. Declaration

At its Winter Business Meeting, ACHP members voted to endorse a plan supporting the United Nations Declaration on the Rights of Indigenous Peoples, becoming the first federal agency to do this. Read more.

ACHP Sends Final Comments on Pawtucket Dam to FERC



The ACHP has prepared final comments for the Federal Energy Regulatory Commission (FERC) regarding proposed alterations to the historic Pawtucket Dam in the Merrimack River at Lowell, Massachusetts. The action comes in the wake of FERC's January 8 notification that the agency was terminating the Section 106 process of the National Historic Preservation Act. That provision requires federal agencies to consider the impacts of undertakings they carry out, fund, or license on properties listed, or eligible for listing, on the National Register of Historic Places. Read more, including the comments to FERC.

First Lady Designates New Communities

Michelle Obama has signed and sent letters of designation to five new Preserve America Communities. Please read more.



ACHP Announces GAO Report Calling for Improved Data on Historic Properties
The U.S. Government Accountability Office recently released a report entitled “Improved Data Needed to Strategically Manage Historic Buildings, Address Multiple Challenges” http://www.gao.gov/products/GAO-13-35. This report was developed in consultation with the ACHP as well as the General Services Administration, the National Park Service, and the Department o f Veterans Affairs. Read more about the importance of this data and links to the ACHP’s Section 3 report.

ACHP Weighs in on Senate Bill to Provide $60.4 billion in Hurricane Sandy Recovery Funds
The ACHP, in its role to advise Congress and the President, has offered information regarding money for the Historic Preservation Fund in ongoing negotiations for hurricane recovery funding. Please read more.

Advisory Council on Historic Preservation, Four Cabinet Departments Sign Memorandum of Understanding to Better Protect Indian Sacred Sites
Four cabinet-level departments joined the Advisory Council on Historic Preservation (ACHP) today in signing a Memorandum of Understanding (MOU) to improve the protection of Indian sacred sites. Read more.

Important New Tribal Consultation Tool Launched by HUD
The Department of Housing and Urban Development (HUD) recently launched its Tribal Directory Assessment Tool, an online resource for identifying which Indian tribes have an interest in each state or county in the United States. The tool, originally developed for HUD’s grant recipients, is available for all Section 106 practitioners to use at http://egis.hud.gov/tdat/Tribal.aspx. Read more.

New Guidance on Program Comment for Common Post-1945 Bridges
The ACHP and Federal Highway Administration (FHWA) have developed joint guidance on implementing the Program Comment for common Post-1945 concrete and steel bridges. The Program Comment eliminates the need for federal agencies to consider many common post-1945 concrete and steel bridges during Section 106 review. Please read more. Questions? Check out the new Q & A on the FHWA website.



National History Teacher of the Year 2012 Named
Joshua Bill, a history teacher from Waukegan, Illinois was named the National History Teacher of the Year Dec. 4 at a ceremony in New York City. Preserve America is a long-time partner of Gilder Lehrman in administering this prestigious award. Read more.



Preservation as a Movement is Key to National Trust Strategy
Stephanie Meeks, president of the ACHP's long-time partner the National Trust for Historic Preservation, gave a moving plenary speech at the National Preservation Conference in Spokane, Washington, recently. Please click here to read her speech and think about the difference you can make as a historic preservationist.

World Heritage Sites Report Released



The ACHP and partners convened a symposium on U.S. World Heritage Sites at the University of Virginia, itself a World Heritage Site. The unique gathering of public and private sector representatives of the preservation and conservation communities and the tourism industry launched an important and ongoing effort to promote U.S. World Heritage Sites as a component of Administration efforts designed to stimulate international travel to the U.S. Read more, including the illustrated report on the findings.

Department of the Interior Announces Plan for Solar Energy Development in Six Western States
Read more about developments with the Department of the Interior and solar energy.

Native American Traditional Cultural Landscapes and the Section 106 Review Process: Questions and Answers
The ACHP has issued its Q&A for dealing with Traditional Cultural Landscapes and Section 106. Read more.

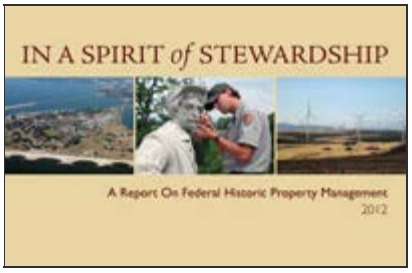
ACHP Chairman Contributes to White House Blog
ACHP Chairman Wayne Donaldson wrote an informative piece on the Traditional Cultural Landscapes Plan and how the President's initiatives to engage Native Americans are an integral part of historic preservation decisions.

Read the blog entitled: Native American Traditional Cultural Landscapes Action Plan - Better Decisions for Historic Properties here:
http://www.whitehouse.gov/nativeamericans

ACHP Guidance on Reasonable and Good Faith Efforts
Read the policy issued by ACHP.

Economic Impacts of Historic Preservation Study Released
A 2011 study commissioned by the ACHP, with funding assistance from the U.S. Department of Commerce, Economic Development Administration, identifies and analyzes methods for measuring the economic impacts of historic preservation. The report focuses on such economic indicators as jobs and household income, property values, heritage tourism, sustainable development, and downtown revitalization, and recommends ways to improve our understanding of how preservation activity supports economic vitality.
Read the full report here.
Read a brief compilation of related facts and figures here.

Section 3 Report to the President Now Available
The 2012 Report to the President on the federal government's stewardship of its historic properties is now available.**Download the report**.



Preserve America E-Newsletter Available
Read the latest e-newsletter with stories of new designations and activities Preserve America Communities can host for heritage tourism, and much more.

New AIA/CES and AICP/CM continuing education opportunity
Planners and architects can now fulfill their continuing education requirements in part by attending ACHP Section 106 training. The ACHP's Section 106 Essentials course has been approved to offer 12 CM credits to American Institute of Certified Planners members and 12 LUs for members of the American Institute of Architects. For more information or to register, visit the **Section 106 Essentials page**.

Citizen's Guide to Section 106 New Edition Now Available
The ACHP is proud to announce it has updated and reissued ***Protecting Historic Properties: A Citizen's Guide to Section 106***. The Citizen's Guide is a useful tool for learning how to protect historic places in your community.

Web-based Archaeology Guidance Now Available
Washington, D.C.—The Advisory Council on Historic Preservation has developed new archaeology guidance to assist federal agencies in meeting their responsibilities under Section 106 of the National Historic Preservation Act. The guidance is available at: **www.achp.gov/archguide. Read more**.

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ACHP Guidance on Program Comments as a Program Alternative
Register for the ACHP's Section 106 Course
Heritage Tourism
Economic Issues in Historic Preservation
Preserve America

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New Member Named to ACHP (Teresa Leger)

ACHP to Meet March 1 for Winter Business Meeting

New ACHP Expert Member Named (Lynne Sebastian)

America's 11 Most Endangered Historic Places--Now Accepting Nominations!

Call for Nominations!

Catch a Section 106 Webinar This Winter!

ACHP Chairman Participating in White House Conference

Chairman's Award Presented Nov. 15

ACHP Vice Chairman Clement Price Named Trustee to National Trust

The ACHP 2013 Section 106 Training Schedule

Report on Right Sizing Informs ACHP Decision Making

ACHP Submits Status Report

Potential of Great Lakes Wind Farms Gets Federal Nod

NASA's High-Tech Shuttles Get High-Tech Recordation

ACHP Strategic Sustainability Performance Plan Now Available

ACHP to Host Panel for Pawtucket Dam Case Termination

Secretary Ken Salazar to Host Meeting on the Federal Preservation Tax Credit

General Services Administration, Alabama Historical Commission Among Partners Received Joint ACHP/National Trust Federal Honor Award

ACHP Publishes Five New Success Stories

National History Teacher of the Year Finalists Announced

Presenters and Attendees Wanted for National Preservation Conference, Spokane, Washington

ACHP Chairman's Award Presented

First Lady Designates New Communities and Steward

Historic Preservation Webinars are Back!

National Trust Most Endangered List Highlights Importance of Section 106

Case Digest Now Available

ACHP Business Meeting Offers Awards and Recognition

First Lady Designates Five New Communities

Register Now for Historic Preservation Training

Prototype PA approved for Privatization of Army Lodging

Section 106 Success Stories

2012

Donaldson to Represent the ACHP at President's Chávez National Memorial Announcement

ACHP Rightsizing Task Force to Meet in Cleveland

Secretary of the Interior Historic Preservation Awards

GSA Wins Chairman's Award (Presentation Narrative)

New National Programmatic Agreement Enhances BLM Tribal Consultation and Public Participation Practices

New ACHP Guidance Now Available

The Big Read is a Big Opportunity for Preservation Non-Profits

ACHP Chairman Honors Newest Community—Filipinotown, Los Angeles

Fort Monroe, Virginia: A Section 106 Success Story (Accompanying article from *Colonial Williamsburg* by Gil Klein about slavery and Fort Monroe.)

FAQs Now Available for Disaster Response Planning

Federal Oversight and Assistance for Shale Gas Development and Section 106

ACHP Publishes New Guidance

ACHP Issue Spotlight: Transmission Lines in the West

Developing a 21st Century Conservation Agenda - America's Great Outdoors Initiative report issued

ACHP Task Force on Sustainability and Historic Preservation

PA Grants Effectiveness Report Released

ACHP Spring Business Meeting May 10

ACHP Adopts Traditional Cultural Landscapes Plan

ACHP Publishes Native Hawaiian Consultation Handbook

ACHP Publishes Native Hawaiian Consultation Handbook Press Release

ACHP Publishes New Guidance

Call for Outstanding Federal Historic Preservation Partnerships!

Vermont Village Revitalization Initiative Wins Chairmans Award

BLM National Programmatic Agreement Improves Consultation

Stacy Hoeflich Wins National History Teacher of the Year

National Trust/ACHP Joint Award Awarded

ACHP Commends Preservation Efforts at 9/11 Historic Sites

ACHP Chairman's Award Seeking Nomination

2012 Section 106 Training Registration Now Open

ACHP Meets in Seattle

ACHP Completes Review of Section 106 Regs; Public Comment Analyzed

Army Interiors Prototype PA Provides Guidance

Department of Energy's B Reactor Preservation Project Honored For Federal Leadership, Commitment to Historic Hanford Facility

Obama Names ACHP Vice Chairman

Get Youth Involved to Build a Better Preservation Ethic – and Nation by Milford Wayne Donaldson, FAIA (2011)

President Announces Appointments to Advisory Council on Historic Preservation

Mrs. Obama Designates Nine New Communities

Section 106 and the 11 Most Endangered Historic Places

Case Study - Kentucky and Indiana

ACHP Activities Overview

Native Hawaiian Federal Interagency Working Group Created

ACHP Publishes Q&A for Gulf Oil Spill Response

ACHP Updates Tribal Consultation Plan

ACHP and Department of Energy Streamline Section 106 Process

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Traditional Cultural Landscapes Forum Provides Action Plan

Native American Program Newsletters

ACHP Member Wins DOI Historic Preservation Award

ACHP Conducts Retrospective Analysis of Regulations

ACHP Gives Chairman's Award to Marine Corps Base Quantico and Others

What About a Wind Farm Project Triggers Section 106?

ACHP Action Items from Tribal Summit on Renewable Energy

Archaeology Q&A with Council Member Julia King

Preserve America E-Newsletter Available

ACHP Chairman Wayne Donaldson Celebrates with LA Preserve America Neighborhoods

ACHP Gives Chairman's Award

President Announces New ACHP Members

First Lady Designates 15 New Preserve America Communities

Nominate Your Favorite Preservation Project — TODAY

ACHP Chairman Speaks to Tribal Leaders

ACHP Announces 2011 Section 106 Training

Plan for Operations in the absence of Appropriations

Famed Tuskegee Airmen Airstrip Wins National Award

McAlister Named History Teacher of the Year

Preserve America Grants Awarded

Successful Section 106 Outcome Makes Way for Historical Park in Wyoming

ACHP Awards Colorado Youth Summits

America's Great Outdoors Wants to Hear from You

First Lady Designates 29 New Preserve America Communities

ACHP and Department of Energy Streamline Section 106 Process

ACHP Business Meeting Feb. 17 in Washington, D.C.

Former Chairman Wins Archaeology Award

2010

ACHP to Offer Training in Micronesia

Cape Wind Project Approved by Secretary Salazar

ACHP Honors Army Partnership That Preserved Fort Monroe, Virginia

Cape Wind Project Formal Comments Conveyed to Secretary Salazar on April 2

Registration is now open for ACHP's 2010 Training

President Names Donaldson New ACHP Chairman

ACHP and the Cape Wind Case

New Preserve America Communities and Stewards Named

ACHP Issues Program Comment for Disposal of Navy Vessels

ACHP Signs Agreement for Nine Mile Canyon

ACHP Chairman Urges Full Funding

2009 Preserve America History Teacher of the Year Announced

Chairman's Award Announced at ACHP Business Meeting

Preserve America Award Honors Department of Transportation

Nine Federal Agencies Enter int a Memorandum of Understanding Regarding Transmission Siting on Federal Lands

ACHP Issues Program Comment to Streamline Communication Facilities Construction and Modification

Chairman Nau and Laura Bush Receive Chafee Award at Trust Meeting

FTA Receives Award for Vesey Street Staircase from World Trand Center

ACHP Gives Awards

Harpers Ferry Service Learning Project Unveiled

2009

ACHP Announces Special Recovery Act Section 106 Training

New Preserve America Communities Honored by the White House

Tribal Grants | Presidential Proclamation

Tribal Spotlight

Summer Case Digest Now Available

ACHP Issues Program Comment for GSA on Select Repairs and Upgrades

Preserve America Communities and Stewards Designated

Recovery Act Information Now Available

Join Us in Nashville at the National Preservation Conference

Army Headquarters Liaison Position Available

ACHP Seeks Public Input for Program Comment on RUS/NTIA Communication Facilities

Omnibus Public Land Management Act Becomes Law, Authorizes Facets of Preserve America and Save America's Treasures

Tribal Nation Named Preserve America Community

July Preserve America E-Newsletter Available

ACHP Gives Awards at Business Meeting

Fort Monroe Agreement Signed

ACHP Receives Section 213 Report on Presidio of San Francisco

Spring Case Digest Now Available

Recovery Act Section 106 Training

ACHP Seeks Public Input for Program Comment on Select GSA Repairs and Upgrades

Hall Named Assistant Director

New ACHP Course Offering

ACHP Adopts Report of the Expert Panel

ACHP Gives Chairman's Award and ACHP PA Award at Meeting

BLM Nationwide Programmatic Agreement Addendum Signed

New Feature! Case Digest Index

Section 213 Guidance Now Available

Native American Program Seeks Assistant

Expert Panel Report Submitted

Legislation Passes Senate

E-News Extra! Now Available

St. Elizabeths Programmatic Agreement Signed

The ACHP Announces Landmark Publication

Native American Program News

Winter Case Digest Now Available

General Services Administration Liaison Position Available

ACHP Winter Business Meeting

2008

Native American Program Newsletters

ACHP Issues Comments on Shooting Range

Nationwide Programmatic Agreement Streamlines 106 Process for NPS

Nelson Named Director of Office of Federal Agency Programs

ACHP Issues Program Comments for DoD

President Bush Names New ACHP Member

Winter 2008 Case Digest Now Available

Fall Preserve America E-Newsletter Now Available

ACHP Inducts New Members and Gives Award to HUD

Involving Youth in Historic Preservation

National Trust/ACHP Joint Award Presented in Tulsa

Chairman Nau Addresses National Congress of American Indians Conference

ACHP Issues Final Comments on Hangar 1, Moffett Field

President Appoints New ACHP Members

National Historic Trails Receive Chairman's Award

ACHP Adopts Archaeology Policy Statement

ACHP Announces Native Hawaiian Organization Policy

Chairman Praises Designation of Hanford B Reactor

Apply Now for Preserve America Presidential Awards

Director Job Available at the ACHP

Shooting Range Proposed; Public Comments Welcomed Through October 28

Summer Case Digest Now Available

Senior Policy Officials Meet About Section 3

2008 Preserve America Presidential Awards Presented

Department of Energy Wins Chairman's Award

Council Members Approve Native Hawaiian Policy Statement

Expert Panel to Explore Preservation Program

Spring Case Digest Available

Native American Program Expands Staff

Spring Preserve America E-Newsletter Now Available

ACHP Supports Policy Statement on Historic Nuclear Reactor

Army Liaison Job Available

Comments Sought for Standard Treatments for Historic Exterior Masonry

"Using Archaeological Resources for Public Benefit" Comments Requested

Winter Preserve America E-Newsletter Now Available

ACHP Holds Winter Business Meeting

"Working Effectively With Tribal Governments" Course Now Online

Native American Program Newsletter Now Available

Case Digest Winter Edition Available

Mrs. Laura Bush Announces Bipartisan Historic Preservation Legislation

New Communications Director Joins ACHP Staff

2007

NOAA and DoD Receive Preservation Awards

Case Digest Fall Edition Available

National Trust/ACHP Award Presented

Council Member Appointments Announced

ACHP Delivers Preserve America Summit Recommendations to President and First Lady

Fall Preserve America E-Newsletter

Historic Preservation in Action—Read the Case Digest

Mississippi GIS Draws Attention to Historic Properties

National Park Service Wins Preserve America Award

ACHP Meets in Vicksburg

Preserve America Communities Total 521

Mrs. Laura Bush Announces First 2007 Preserve America Grant Recipients, New Communities

2007 Preserve America Presidential Awards Presented

ACHP Hosted Spring Business Meeting

May 2007 Preserve America E-Newsletter

Spring *Case Digest* Released (pdf)

President's 2008 Budget Proposes Increases for Historic Preservation

ACHP Issues Revised Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects

ACHP Makes Recommendations to National Science Foundation

ACHP's BRAC Task Force posts Federal Preservation Program Notes

Newspaper In Education Insert Now Available: Preserving America's Heritage: The National Historic Preservation Act 40th Anniversary

ACHP Adopts New Affordable Housing Policy

Honors Given for Capital Planning and Travel Itineraries

ACHP Addresses Priority Ideas from Preserve America Summit

Senior Policy Officials Discuss Needs Under Section 3

ACHP Seeks Public Comment on Kitt Peak, Arizona, Telescope Issue

Mrs. Laura Bush Rededicates Renovated National Historic Landmark Treasury Building

2007 Preserve America Grants

2006

National Historic Preservation Act Amendments Act of 2006 Signed by President

Amy Biehl High School Wins National Trust/ACHP Award

National Historic Preservation Act 40th Anniversary Logo

National Preserve America Summit a Success in New Orleans

U.S. Fish and Wildlife Service Receives ACHP Award for Federal Preserve America Accomplishment

Internal Revenue Service Wins Chairman's Award for Federal Achievement in Historic Preservation

Three New ACHP Members Receive Oath of Office

First Lady Laura Bush Designates Three New Preserve America Communities, Recognizes Four Gulf Coast Historic Preservation Project Grant Recipients, During New

Orleans Preserve America Summit

Mrs. Laura Bush Presents “Preserve America History Teacher of the Year” Award to West Virginia Teacher

Second Round of Preserve America Grants Announced

Nov. 1 deadline for 2007 Preserve America Presidential Award Nominations

Preservation Ethic Panel Seeks Public Comment

Jacksonville District, U.S. Army Corps Of Engineers Receives Chairman's Award for Federal Achievement in Historic Preservation

Bob Young, Southeast Region Director, U.S. Department of Housing and Urban Development, Receives ACHP Award for Federal *Preserve America* Accomplishment

President Announces Two Appointments to Advisory Council on Historic Preservation

Mrs. Laura Bush Announces Summit

ACHP Presents Preserve America Community Designations to Salt Lake City and Brigham City During Spring Business Meeting

President and First Lady Present 2006 Preserve America Awards

Archeology Task Force publishes draft revised human remains policy

Three New Members Named to Advisory Council on Historic Preservation; Chairman John L. Nau, III, Reappointed to Second Term; Susan S. Barnes Named Vice-Chairman

Mrs. Laura Bush Announces First Preserve America Grant Recipients, Neighborhoods

ACHP Delivers Executive Order Report to President

Three New Members Named to Advisory Council on Historic Preservation; Chairman John L. Nau, III, Reappointed to Second Term; Susan S. Barnes Named Vice-Chairman

Mrs. Laura Bush Announces First *Preserve America* Grant Recipients, Neighborhoods

Archeology Task Force publishes draft revised human remains policy

ACHP Delivers Executive Order Report to President

ACHP Seeks Public Input in Developing Comments on the Replacement of a Microwave Communications System in Mount Graham, Arizona (PDF)

2005

Federal Highway Administration wins Chairman's Award for Federal Achievement in Historic Preservaiton

Twenty-eight new *Preserve America* communities recognized

ACHP Closes Denver Office

Mrs. Laura Bush Presents "*Preserve America* History Teacher of the Year" Award to New Jersey Teacher

ACHP Business Meeting Notices/Historic Preservation Bulletin Board

ACHP Faults Navy Plan for Failure to Preserve Pensacola Historic Structures

Congress Passes Transportation Reauthorization Bill

ACHP to Consolidate Resources by Closing Colorado Field Office

HUD Wins ACHP Chairman's Award for Federal Achievement in Historic Preservation

Mrs. Laura Bush Announces New *Preserve America* Neighborhood Designation Program

New *Preserve America* Communities Recognized for Commitment to Historic Preservation

38 Historic Buildings Saved at Eisenhower VA Medical Center in Leavenworth, Kansas

Bureau of Land Management Wins ACHP Chairman's Award for Federal Achievement in Historic Preservation

Seven Maryland *Preserve America* Communities Designated, Recognized at ACHP Business Meeting

President and Mrs. Bush Present the 2005 *Preserve America* Presidential Awards

Chairman Nau Testifies on the National Historic Preservation Act

ACHP Objects to Courtyard Enclosure Plan for Old Patent Office Building

President Bush Requests $12.5 Million in *Preserve America* Grants

President Bush Announces Three Appointments to the ACHP

ACHP Adopts Preservation Easements Resolution and Interstate Highway Exemption

Navy Receives ACHP Chairman's Award for Saving Hotel Del Monte Buildings

Mrs. Laura Bush Designates Two Colorado Towns As *Preserve America* Communities

2004

NOAA and NPS Receive ACHP Chairman's Award

Five Virginia *Preserve America* Communities Receive Designation Certificates at ACHP Fall 2004 Business Meeting

Mrs. Laura Bush Designates 61 New *Preserve America* Communities

"Following the Smoke" Project Wins ACHP Chairman's Award

Section 106 Amendments Now in Effect

Mrs. Laura Bush Designates Corinth, Mississippi, a *Preserve America* Community

Blackstone River Valley Towns and Cities Designated Newest *Preserve America* Communities

Fifteen *Preserve America* Communities Designated in Texas

President and Mrs. Bush Present First *Preserve America* Presidential Awards

Mrs. Laura Bush Designates 31 *Preserve America* Communities in Kentucky

Agreement Signed on the Treatment of Federal Historic Properties along the Upper Missouri River

Historic Preservation Caucus Sponsors *Preserve America* Community Designation Event

ACHP Endorses Tourism Memorandum of Understanding

Blackstone River Valley Presents 24 *Preserve America* Community Applications to the ACHP

Laura Bush Announces *Preserve America* Grants Budget; First *Preserve America* Communities Also Announced

2003

Federal Emergency Management Agency and Its New York Partners Honored for Historic Preservation Efforts in Aftermath of World Trade Center Attack

Call for Public Comments on Amendments to Section 106 Regulations

Mrs. Laura Bush Announces *Preserve America* Community Designations, Presidential Awards

ACHP to Hold Public Meeting in Virginia on Corps of Engineers Chancellorsville Battleground Permit Issue

Call for Nominations for Chairman's Award for Federal Achievement in Historic Preservation

Preserve America Initiative Featured on June 4 Live Satellite Telecast

Three New Members Named to ACHP; New Members Are from Maryland, Colorado, and Minnesota

ACHP Chairman Nau Speaks on "The Economic Potential of Preserving America"

Economic Development Administration Receives Chairman's Preservation Award for Cumbres & Toltec Scenic Railroad

ACHP Receives "Excellence in Environmental Streamlining" Award from FHWA

ACHP Releases Upper Missouri River Corps of Engineers Historic Preservation Report

First Lady Laura Bush Launches Preserve America Initiative

President Bush Issues Executive Order on Preserve America

ACHP Chairman's Statement on Preserve America

Three ACHP Members Honored for Their Commitment to Historic Preservation

Federal Aviation Administration Receives Chairman's Historic Preservation Award for San Diego, Sitka, and Newark Projects

ACHP Chairman Nau Commends Mississippi Battlefield Preservation Effort

2002

Susan Schanlaber Receives Oath of Office for the Advisory Council on Historic Preservation

Emily Summers Receives Oath of Office for the Advisory Council on Historic Preservation

First Chairman's Awards for Federal Achievement in Historic Preservation Presented to General Services Administration and U.S. Fish and Wildlife Service

ACHP and NTHP to Present First Award for Federal Partnerships for Historic Preservation; Award Celebrates Raising of Hunley Submarine from Ocean Floor

Chairman Nau: "Preservation Is One Key to Salvation for Cities and History"

ACHP Chairman John L. Nau, III, Appointed to Presidential Task Force

Advisory Council on Historic Preservation and National Trust for Historic Preservation Honor Pentagon Renovation Efforts

President Bush Appoints Two New Members to ACHP

ACHP Endorses Florida Transportation Initiative to Improve Decisionmaking

ACHP Unveils New Guide to Historic Preservation Funding

New Guidelines Will Improve Historic Preservation at Hydroelectric Sites

ACHP Chairman Encourages Collaboration Between National Parks and Local Communities

Agreement Addresses Management of Navy Region Hawaii Historic Sites

Agreement Streamlines Review of Resource Conservation Activities

Hearing Held on Federal Management of Missouri River Historic Properties

ACHP Continues New Direction at Spring Business Meeting

ACHP Approves Streamlined Approach for Army Management of Historic Cold War Era Housing

Agreement Signed to Speed Grants to Historic Properties Near World Trade Center Site

Agreement Signed to Expedite Reviews for Washington Monument Security Enhancements

ACHP Streamlines Preservation Review for Historic Natural Gas Pipelines

New ACHP Program Direction Outlined in Chairman's Statement to House Appropriations Committee

NPS Endorses ACHP Policy Statement on Balancing Cultural and Natural Values

ACHP Chairman Calls for Better Partnerships to Promote Historic Preservation

ACHP Launches New Look and Organization at Winter 2002 Meeting

2001

Interim Guidance for Section 106 Cases Involving “No Historic Properties Affected” and “No Adverse Effect” Findings

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The National Historic Preservation Program

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- **The National Historic Preservation Act of 1966, as amended**
- **Executive Order 13287, Preserve America, Section 3 Reporting**
- **Laws and Authorities Related to NHPA**
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Working with Section 106

Section 106 Assistance for Users

Publications, guidance, opinions, and information to assist Section 106 users in applying the regulations.

Identifying ACHP Contacts for Section 106

The Office of Federal Agency Programs (OFAP) represents the ACHP in Section 106 cases. Use the OFAP Agency Organizational Chart to identify the appropriate OFAP contact for assistance with a Section 106 issue related to a specific federal agency. If you have an issue with an agency not listed on this chart, please contact Odette Williams, administrative assistant, at 202-606-8505 or owilliams@achp.gov.

OFAP is organized into two sections to address program and policy development in key areas. Use the OFAP Policy Organizational Chart to identify the appropriate section and point of contact in OFAP to address issues relating to these policy areas.

Protecting Historic Properties: A Citizen's Guide to Section 106 (2010 edition)

Section 106 Regulations (in PDF)

Text of ACHP's regulations, "Protection of Historic Properties" (36 CFR Part 800) *(incorporates amendments effective Aug. 5, 2004)*

Guidance on Coordinating NEPA and Section 106

The White House Council on Environmental Quality and the ACHP released a handbook designed to help coordinate required review processes under the National Historic Preservation Act and the National Environmental Policy Act. The handbook stands to significantly improve the coordination of environmental reviews across the government. This handbook provides practical advice to practitioners and stakeholders to improve the efficiency and effectiveness of federal agencies' environmental review.

ACHP *Case Digest*

Section 106 case highlights

Section 106 Archaeology Guidance

Section 213 Report

Renewable Energy and Historic Preservation

This web page serves as a central link to a range of resources regarding ACHP involvement and activities related to Renewable Energy and

Historic Preservation. This includes guidance memos, task force participation, and other relevant and important information to assist federal agencies, tribes, other stakeholders, and the public.

Review of Section 106 Regs Under E.O. 13563

Consistent with the requirements of Executive Order 13563, "Improving Regulation and Regulatory Review," the ACHP has completed a review of the regulations implementing Section 106 of the National Historic Preservation Act. The ACHP adopted a plan for completing this and future reviews on August 11, 2011. Read the plan. Read the summary of public comments and actions.

Program Alternatives – 36 CFR § 800.14

Nominate Your Federal Activity for the ACHP Chairman's Award for Federal Achievement in Historic Preservation

ACHP Native American Program: Guidance for Federal Agencies

Information for Federal agencies working with Native Americans in the Section 106 process

ACHP's Archeology Task Force

Guidance for archeology conducted under Section 106

Section 106 Training and Education

Information on ACHP training activities

Federal Historic Preservation Case Law, 1966-2000

Handbook of Federal historic preservation cases

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Federal Agency Historic Preservation Programs and Officers

- **Introduction and Information**
- **Agency List**
- **Federal Agency Section 3 Reports (EO 13287)**

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Tribal Historic Preservation Officers

ACHP Office of Native American Affairs

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Training and Education

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- **Useful Resources on the Web**
- **International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM)**
- **Distance Learning**

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ACHP Publications

Preserve America Fact Sheet (2012)

Traditional Cultural Landscapes Action Plan (2012)

About the ACHP fact sheet (2011)

Office of Native American Affairs fact sheet (2011)

Section 106 fact sheet (2011)

Get Youth Involved to Build a Better Preservation Ethic - and Nation by Milford Wayne Donaldson, FAIA (2011)

Protecting Historic Properties: A Citizen's Guide to Section 106 Review (updated edition 2010)

About the ACHP Fact Sheet (2009)

Native American Fact Sheet (2009)

Preserve America HUD Fact Sheet (2009)

Preserve America Fact Sheet (2009)

Section 106 Fact Sheet (2009)

Section 106 Primer: Preserving America's Heritage (2010)

Preserve America Executive Order Report to the President (2009)

The Preserve America Executive Order: Report to the President (2007)

Becoming Better Stewards of Our Past: Recommendations for Enhancing Federal Management of Historic Properties (2004)

Heritage Tourism and the Federal Government: Summit II—Report of Proceedings (2003)

Heritage Tourism and the Federal Government: Summit I—Report of Proceedings (2002)

Heritage Tourism and the Federal Government: Northern New Mexico Perspectives (2002)

About the ACHP (2002)

Using Section 106 to Protect Historic Properties (2002)

Protecting Historic Properties: A Citizen's Guide to Section 106 Review

(2002)

Federal Historic Preservation Case Law, 1966-2000 (2001)

Caring for the Past, Managing for the Future: Federal Stewardship and America's Historic Legacy (full report) (2001)

Caring for the Past, Managing for the Future: Federal Stewardship and America's Historic Legacy (summary report) (2000)

Report to the President and Congress, 1998-1999 (2000)

Report to the President and Congress, 1996-1997 (1998)

Alternatives for Implementing Section 106 of the National Historic Preservation Act: An Assessment (1998)

Report Requested by the Committees on Appropriations (1996)

Defense Department Compliance with the National Historic Preservation Act: Section 202(a)(6) Evaluation Report (1994)

Balancing Historic Preservation Needs with the Operation of Highly Technical or Scientific Facilities (1991)

Balancing Assessing the Energy Conservation Benefits of Historic Preservation: Methods and Examples (1979)

Please visit the links above for each publication's ordering information.

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Executive Order No. 13007: Indian Sacred Sites

May 24, 1996

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. *Accommodation of Sacred Sites.* (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:
i. "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;
ii. "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe; and
iii. "Sacred site" means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Section 2. *Procedures.* (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments."

(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things,
i. any changes necessary to accomodate access to and ceremonial use of Indian sacred sites;
ii. any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and
iii. procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Section 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, "agency action" has the same meaning as in the Administrative Procedures Act (5 U.S.C.551[13]).

Section 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies officers, or any person.

William J. Clinton

The White House
May 24, 1996

Updated April 30, 2002

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ADVISORY COUNCIL ON HISTORIC PRESERVATION

The Advisory Council on Historic Preservation promotes the preservation, enhancement, and sustainable use of our nation's diverse historic resources, and advises the President and the Congress on national historic preservation policy.

Preserving America's Heritage[sm]

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ACHP and CEQ Release Handbook on Coordination of Important Federal Processes

Today, the White House Council on Environmental Quality and the ACHP released a handbook designed to help coordinate required review processes under the National Historic Preservation Act and the National Environmental Policy Act. The handbook stands to significantly improve the coordination of environmental reviews across the government. This handbook provides practical advice to practitioners and stakeholders to improve the efficiency and effectiveness of federal agencies' environmental review.

Read the press release.

Read the handbook.

Read more from CEQ and the ACHP about this important guidance.

ACHP Business Meeting Provides Plenty of Preservation News

Members of the ACHP met March 1 to pass resolutions, discuss the 50th anniversary of the NHPA, swear in new members, and discuss plenty of historic preservation initiatives and news. Read the highlights of the business meeting.

Secretary of the Interior Presents Awards at Winter Meeting



Secretary Ken Salazar today presented the Department of the Interior's 2012 Historic Preservation Awards and administered the oath of office to s of the Advisory Council on Historic Preservation (ACHP). Read more

ACHP Endorses Plan to Support U.N. Declaration

At its Winter Business Meeting, ACHP members voted to endorse a plan supporting the United Nations Declaration on the Rights of Indigenous Peoples, becoming the first federal agency to do this. Read more.

ACHP Sends Final Comments on Pawtucket Dam to FERC



The ACHP has prepared final comments for the Federal Energy Regulatory Commission (FERC) regarding proposed alterations to the historic Pawtucket Dam in the Merrimack River at Lowell, Massachusetts. The action comes in the wake of FERC's January 8 notification that the agency was terminating the Section 106 process of the National Historic Preservation Act. That provision requires federal agencies to consider the impacts of undertakings they carry out, fund, or license on properties listed, or eligible for listing, on the National Register of Historic Places. Read more, including the comments to FERC.

First Lady Designates New Communities

Michelle Obama has signed and sent letters of designation to five new Preserve America Communities. Please read more.



ACHP Announces GAO Report Calling for Improved Data on Historic Properties
The U.S. Government Accountability Office recently released a report entitled “Improved Data Needed to Strategically Manage Historic Buildings, Address Multiple Challenges” http://www.gao.gov/products/GAO-13-35. This report was developed in consultation with the ACHP as well as the General Services Administration, the National Park Service, and the Department o f Veterans Affairs. Read more about the importance of this data and links to the ACHP’s Section 3 report.

ACHP Weighs in on Senate Bill to Provide $60.4 billion in Hurricane Sandy Recovery Funds
The ACHP, in its role to advise Congress and the President, has offered information regarding money for the Historic Preservation Fund in ongoing negotiations for hurricane recovery funding. Please read more.

Advisory Council on Historic Preservation, Four Cabinet Departments Sign Memorandum of Understanding to Better Protect Indian Sacred Sites
Four cabinet-level departments joined the Advisory Council on Historic Preservation (ACHP) today in signing a Memorandum of Understanding (MOU) to improve the protection of Indian sacred sites. Read more.

Important New Tribal Consultation Tool Launched by HUD
The Department of Housing and Urban Development (HUD) recently launched its Tribal Directory Assessment Tool, an online resource for identifying which Indian tribes have an interest in each state or county in the United States. The tool, originally developed for HUD’s grant recipients, is available for all Section 106 practitioners to use at http://egis.hud.gov/tdat/Tribal.aspx. Read more.

New Guidance on Program Comment for Common Post-1945 Bridges



The ACHP and Federal Highway Administration (FHWA) have developed joint guidance on implementing the Program Comment for common Post-1945 concrete and steel bridges. The Program Comment eliminates the need for federal agencies to consider many common post-1945 concrete and steel bridges during Section 106 review. Please read more. Questions? Check out the new Q & A on the FHWA website.

National History Teacher of the Year 2012 Named



Joshua Bill, a history teacher from Waukegan, Illinois was named the National History Teacher of the Year Dec. 4 at a ceremony in New York City. Preserve America is a long-time partner of Gilder Lehrman in administering this prestigious award. Read more.

Preservation as a Movement is Key to National Trust Strategy
Stephanie Meeks, president of the ACHP's long-time partner the National Trust for Historic Preservation, gave a moving plenary speech at the National Preservation Conference in Spokane, Washington, recently. Please click here to read her speech and think about the difference you can make as a historic preservationist.

World Heritage Sites Report Released



The ACHP and partners convened a symposium on U.S. World Heritage Sites at the University of Virginia, itself a World Heritage Site. The unique gathering of public and private sector representatives of the preservation and conservation communities and the tourism industry launched an important and ongoing effort to promote U.S. World Heritage Sites as a component of Administration efforts designed to stimulate international travel to the U.S. Read more, including the illustrated report on the findings.

Department of the Interior Announces Plan for Solar Energy Development in Six Western States
Read more about developments with the Department of the Interior and solar energy.

Native American Traditional Cultural Landscapes and the Section 106 Review Process: Questions and Answers
The ACHP has issued its Q&A for dealing with Traditional Cultural Landscapes and Section 106. Read more.

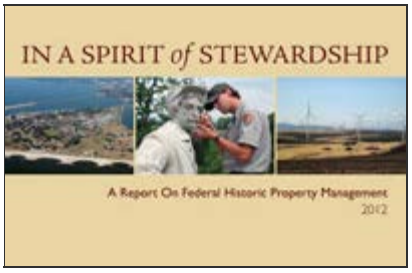
ACHP Chairman Contributes to White House Blog
ACHP Chairman Wayne Donaldson wrote an informative piece on the Traditional Cultural Landscapes Plan and how the President's initiatives to engage Native Americans are an integral part of historic preservation decisions.

Read the blog entitled: Native American Traditional Cultural Landscapes Action Plan - Better Decisions for Historic Properties here:
http://www.whitehouse.gov/nativeamericans

ACHP Guidance on Reasonable and Good Faith Efforts
Read the policy issued by ACHP.

Economic Impacts of Historic Preservation Study Released
A 2011 study commissioned by the ACHP, with funding assistance from the U.S. Department of Commerce, Economic Development Administration, identifies and analyzes methods for measuring the economic impacts of historic preservation. The report focuses on such economic indicators as jobs and household income, property values, heritage tourism, sustainable development, and downtown revitalization, and recommends ways to improve our understanding of how preservation activity supports economic vitality.
Read the full report here.
Read a brief compilation of related facts and figures here.

Section 3 Report to the President Now Available
The 2012 Report to the President on the federal government's stewardship of its historic properties is now available.**Download the report**.



Preserve America E-Newsletter Available
Read the latest e-newsletter with stories of new designations and activities Preserve America Communities can host for heritage tourism, and much more.

New AIA/CES and AICP/CM continuing education opportunity
Planners and architects can now fulfill their continuing education requirements in part by attending ACHP Section 106 training. The ACHP's Section 106 Essentials course has been approved to offer 12 CM credits to American Institute of Certified Planners members and 12 LUs for members of the American Institute of Architects. For more information or to register, visit the **Section 106 Essentials page**.

Citizen's Guide to Section 106 New Edition Now Available
The ACHP is proud to announce it has updated and reissued ***Protecting Historic Properties: A Citizen's Guide to Section 106***. The Citizen's Guide is a useful tool for learning how to protect historic places in your community.

Web-based Archaeology Guidance Now Available
Washington, D.C.—The Advisory Council on Historic Preservation has developed new archaeology guidance to assist federal agencies in meeting their responsibilities under Section 106 of the National Historic Preservation Act. The guidance is available at: **www.achp.gov/archguide. Read more**.

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Register for the ACHP's Section 106 Course
Heritage Tourism
Economic Issues in Historic Preservation
Preserve America

Advisory Council on Historic Preservation
1100 Pennsylvania Avenue NW, Suite 803
Old Post Office Building
Washington, DC 20004
(202) 606-8503 achp@achp.gov www.achp.gov

USA.gov

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2013

New Member Named to ACHP (Teresa Leger)

ACHP to Meet March 1 for Winter Business Meeting

New ACHP Expert Member Named (Lynne Sebastian)

America's 11 Most Endangered Historic Places--Now Accepting Nominations!

Call for Nominations!

Catch a Section 106 Webinar This Winter!

ACHP Chairman Participating in White House Conference

Chairman's Award Presented Nov. 15

ACHP Vice Chairman Clement Price Named Trustee to National Trust

The ACHP 2013 Section 106 Training Schedule

Report on Right Sizing Informs ACHP Decision Making

ACHP Submits Status Report

Potential of Great Lakes Wind Farms Gets Federal Nod

NASA's High-Tech Shuttles Get High-Tech Recordation

ACHP Strategic Sustainability Performance Plan Now Available

ACHP to Host Panel for Pawtucket Dam Case Termination

Secretary Ken Salazar to Host Meeting on the Federal Preservation Tax Credit

General Services Administration, Alabama Historical Commission Among Partners Received Joint ACHP/National Trust Federal Honor Award

ACHP Publishes Five New Success Stories

National History Teacher of the Year Finalists Announced

Presenters and Attendees Wanted for National Preservation Conference, Spokane, Washington

ACHP Chairman's Award Presented

First Lady Designates New Communities and Steward

Historic Preservation Webinars are Back!

National Trust Most Endangered List Highlights Importance of Section 106

Case Digest Now Available

ACHP Business Meeting Offers Awards and Recognition

First Lady Designates Five New Communities

Register Now for Historic Preservation Training

Prototype PA approved for Privatization of Army Lodging

Section 106 Success Stories

2012

Donaldson to Represent the ACHP at President's Chávez National Memorial Announcement

ACHP Rightsizing Task Force to Meet in Cleveland

Secretary of the Interior Historic Preservation Awards

GSA Wins Chairman's Award (Presentation Narrative)

New National Programmatic Agreement Enhances BLM Tribal Consultation and Public Participation Practices

New ACHP Guidance Now Available

The Big Read is a Big Opportunity for Preservation Non-Profits

ACHP Chairman Honors Newest Community—Filipinotown, Los Angeles

Fort Monroe, Virginia: A Section 106 Success Story (Accompanying article from *Colonial Williamsburg* by Gil Klein about slavery and Fort Monroe.)

FAQs Now Available for Disaster Response Planning

Federal Oversight and Assistance for Shale Gas Development and Section 106

ACHP Publishes New Guidance

ACHP Issue Spotlight: Transmission Lines in the West

Developing a 21st Century Conservation Agenda - America's Great Outdoors Initiative report issued

ACHP Task Force on Sustainability and Historic Preservation

PA Grants Effectiveness Report Released

ACHP Spring Business Meeting May 10

ACHP Adopts Traditional Cultural Landscapes Plan

ACHP Publishes Native Hawaiian Consultation Handbook

ACHP Publishes Native Hawaiian Consultation Handbook Press Release

ACHP Publishes New Guidance

Call for Outstanding Federal Historic Preservation Partnerships!

Vermont Village Revitalization Initiative Wins Chairmans Award

BLM National Programmatic Agreement Improves Consultation

Stacy Hoeflich Wins National History Teacher of the Year

National Trust/ACHP Joint Award Awarded

ACHP Commends Preservation Efforts at 9/11 Historic Sites

ACHP Chairman's Award Seeking Nomination

2012 Section 106 Training Registration Now Open

ACHP Meets in Seattle

ACHP Completes Review of Section 106 Regs; Public Comment Analyzed

Army Interiors Prototype PA Provides Guidance

Department of Energy's B Reactor Preservation Project Honored For Federal Leadership, Commitment to Historic Hanford Facility

Obama Names ACHP Vice Chairman

Get Youth Involved to Build a Better Preservation Ethic – and Nation by Milford Wayne Donaldson, FAIA (2011)

President Announces Appointments to Advisory Council on Historic Preservation

Mrs. Obama Designates Nine New Communities

Section 106 and the 11 Most Endangered Historic Places

Case Study - Kentucky and Indiana

ACHP Activities Overview

Native Hawaiian Federal Interagency Working Group Created

ACHP Publishes Q&A for Gulf Oil Spill Response

ACHP Updates Tribal Consultation Plan

ACHP and Department of Energy Streamline Section 106 Process

2011

Traditional Cultural Landscapes Forum Provides Action Plan

Native American Program Newsletters

ACHP Member Wins DOI Historic Preservation Award

ACHP Conducts Retrospective Analysis of Regulations

ACHP Gives Chairman's Award to Marine Corps Base Quantico and Others

What About a Wind Farm Project Triggers Section 106?

ACHP Action Items from Tribal Summit on Renewable Energy

Archaeology Q&A with Council Member Julia King

Preserve America E-Newsletter Available

ACHP Chairman Wayne Donaldson Celebrates with LA Preserve America Neighborhoods

ACHP Gives Chairman's Award

President Announces New ACHP Members

First Lady Designates 15 New Preserve America Communities

Nominate Your Favorite Preservation Project — TODAY

ACHP Chairman Speaks to Tribal Leaders

ACHP Announces 2011 Section 106 Training

Plan for Operations in the absence of Appropriations

Famed Tuskegee Airmen Airstrip Wins National Award

McAlister Named History Teacher of the Year

Preserve America Grants Awarded

Successful Section 106 Outcome Makes Way for Historical Park in Wyoming

ACHP Awards Colorado Youth Summits

America's Great Outdoors Wants to Hear from You

First Lady Designates 29 New Preserve America Communities

ACHP and Department of Energy Streamline Section 106 Process

ACHP Business Meeting Feb. 17 in Washington, D.C.

Former Chairman Wins Archaeology Award

2010

ACHP to Offer Training in Micronesia

Cape Wind Project Approved by Secretary Salazar

ACHP Honors Army Partnership That Preserved Fort Monroe, Virginia

Cape Wind Project Formal Comments Conveyed to Secretary Salazar on April 2

Registration is now open for ACHP's 2010 Training

President Names Donaldson New ACHP Chairman

ACHP and the Cape Wind Case

New Preserve America Communities and Stewards Named

ACHP Issues Program Comment for Disposal of Navy Vessels

ACHP Signs Agreement for Nine Mile Canyon

ACHP Chairman Urges Full Funding

2009 Preserve America History Teacher of the Year Announced

Chairman's Award Announced at ACHP Business Meeting

Preserve America Award Honors Department of Transportation

Nine Federal Agencies Enter int a Memorandum of Understanding Regarding Transmission Siting on Federal Lands

ACHP Issues Program Comment to Streamline Communication Facilities Construction and Modification

Chairman Nau and Laura Bush Receive Chafee Award at Trust Meeting

FTA Receives Award for Vesey Street Staircase from World Trand Center

ACHP Gives Awards

Harpers Ferry Service Learning Project Unveiled

2009

ACHP Announces Special Recovery Act Section 106 Training

New Preserve America Communities Honored by the White House

Tribal Grants | Presidential Proclamation

Tribal Spotlight

Summer Case Digest Now Available

ACHP Issues Program Comment for GSA on Select Repairs and Upgrades

Preserve America Communities and Stewards Designated

Recovery Act Information Now Available

Join Us in Nashville at the National Preservation Conference

Army Headquarters Liaison Position Available

ACHP Seeks Public Input for Program Comment on RUS/NTIA Communication Facilities

Omnibus Public Land Management Act Becomes Law, Authorizes Facets of Preserve America and Save America's Treasures

Tribal Nation Named Preserve America Community

July Preserve America E-Newsletter Available

ACHP Gives Awards at Business Meeting

Fort Monroe Agreement Signed

ACHP Receives Section 213 Report on Presidio of San Francisco

Spring Case Digest Now Available

Recovery Act Section 106 Training

ACHP Seeks Public Input for Program Comment on Select GSA Repairs and Upgrades

Hall Named Assistant Director

New ACHP Course Offering

ACHP Adopts Report of the Expert Panel

ACHP Gives Chairman's Award and ACHP PA Award at Meeting

BLM Nationwide Programmatic Agreement Addendum Signed

New Feature! Case Digest Index

Section 213 Guidance Now Available

Native American Program Seeks Assistant

Expert Panel Report Submitted

Legislation Passes Senate

E-News Extra! Now Available

St. Elizabeths Programmatic Agreement Signed

The ACHP Announces Landmark Publication

Native American Program News

Winter Case Digest Now Available

General Services Administration Liaison Position Available

ACHP Winter Business Meeting

2008

Native American Program Newsletters

ACHP Issues Comments on Shooting Range

Nationwide Programmatic Agreement Streamlines 106 Process for NPS

Nelson Named Director of Office of Federal Agency Programs

ACHP Issues Program Comments for DoD

President Bush Names New ACHP Member

Winter 2008 Case Digest Now Available

Fall Preserve America E-Newsletter Now Available

ACHP Inducts New Members and Gives Award to HUD

Involving Youth in Historic Preservation

National Trust/ACHP Joint Award Presented in Tulsa

Chairman Nau Addresses National Congress of American Indians Conference

ACHP Issues Final Comments on Hangar 1, Moffett Field

President Appoints New ACHP Members

National Historic Trails Receive Chairman's Award

ACHP Adopts Archaeology Policy Statement

ACHP Announces Native Hawaiian Organization Policy

Chairman Praises Designation of Hanford B Reactor

Apply Now for Preserve America Presidential Awards

Director Job Available at the ACHP

Shooting Range Proposed; Public Comments Welcomed Through October 28

Summer Case Digest Now Available

Senior Policy Officials Meet About Section 3

2008 Preserve America Presidential Awards Presented

Department of Energy Wins Chairman's Award

Council Members Approve Native Hawaiian Policy Statement

Expert Panel to Explore Preservation Program

Spring Case Digest Available

Native American Program Expands Staff

Spring Preserve America E-Newsletter Now Available

ACHP Supports Policy Statement on Historic Nuclear Reactor

Army Liaison Job Available

Comments Sought for Standard Treatments for Historic Exterior Masonry

"Using Archaeological Resources for Public Benefit" Comments Requested

Winter Preserve America E-Newsletter Now Available

ACHP Holds Winter Business Meeting

"Working Effectively With Tribal Governments" Course Now Online

Native American Program Newsletter Now Available

Case Digest Winter Edition Available

Mrs. Laura Bush Announces Bipartisan Historic Preservation Legislation

New Communications Director Joins ACHP Staff

2007

NOAA and DoD Receive Preservation Awards

Case Digest Fall Edition Available

National Trust/ACHP Award Presented

Council Member Appointments Announced

ACHP Delivers Preserve America Summit Recommendations to President and First Lady

Fall Preserve America E-Newsletter

Historic Preservation in Action—Read the Case Digest

Mississippi GIS Draws Attention to Historic Properties

National Park Service Wins Preserve America Award

ACHP Meets in Vicksburg

Preserve America Communities Total 521

Mrs. Laura Bush Announces First 2007 Preserve America Grant Recipients, New Communities

2007 Preserve America Presidential Awards Presented

ACHP Hosted Spring Business Meeting

May 2007 Preserve America E-Newsletter

Spring *Case Digest* Released (pdf)

President's 2008 Budget Proposes Increases for Historic Preservation

ACHP Issues Revised Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects

ACHP Makes Recommendations to National Science Foundation

ACHP's BRAC Task Force posts Federal Preservation Program Notes

Newspaper In Education Insert Now Available: Preserving America's Heritage: The National Historic Preservation Act 40th Anniversary

ACHP Adopts New Affordable Housing Policy

Honors Given for Capital Planning and Travel Itineraries

ACHP Addresses Priority Ideas from Preserve America Summit

Senior Policy Officials Discuss Needs Under Section 3

ACHP Seeks Public Comment on Kitt Peak, Arizona, Telescope Issue

Mrs. Laura Bush Rededicates Renovated National Historic Landmark Treasury Building

2007 Preserve America Grants

2006

National Historic Preservation Act Amendments Act of 2006 Signed by President

Amy Biehl High School Wins National Trust/ACHP Award

National Historic Preservation Act 40th Anniversary Logo

National Preserve America Summit a Success in New Orleans

U.S. Fish and Wildlife Service Receives ACHP Award for Federal Preserve America Accomplishment

Internal Revenue Service Wins Chairman's Award for Federal Achievement in Historic Preservation

Three New ACHP Members Receive Oath of Office

First Lady Laura Bush Designates Three New Preserve America Communities, Recognizes Four Gulf Coast Historic Preservation Project Grant Recipients, During New

Orleans Preserve America Summit

Mrs. Laura Bush Presents “Preserve America History Teacher of the Year” Award to West Virginia Teacher

Second Round of Preserve America Grants Announced

Nov. 1 deadline for 2007 Preserve America Presidential Award Nominations

Preservation Ethic Panel Seeks Public Comment

Jacksonville District, U.S. Army Corps Of Engineers Receives Chairman's Award for Federal Achievement in Historic Preservation

Bob Young, Southeast Region Director, U.S. Department of Housing and Urban Development, Receives ACHP Award for Federal *Preserve America* Accomplishment

President Announces Two Appointments to Advisory Council on Historic Preservation

Mrs. Laura Bush Announces Summit

ACHP Presents Preserve America Community Designations to Salt Lake City and Brigham City During Spring Business Meeting

President and First Lady Present 2006 Preserve America Awards

Archeology Task Force publishes draft revised human remains policy

Three New Members Named to Advisory Council on Historic Preservation; Chairman John L. Nau, III, Reappointed to Second Term; Susan S. Barnes Named Vice-Chairman

Mrs. Laura Bush Announces First Preserve America Grant Recipients, Neighborhoods

ACHP Delivers Executive Order Report to President

Three New Members Named to Advisory Council on Historic Preservation; Chairman John L. Nau, III, Reappointed to Second Term; Susan S. Barnes Named Vice-Chairman

Mrs. Laura Bush Announces First *Preserve America* Grant Recipients, Neighborhoods

Archeology Task Force publishes draft revised human remains policy

ACHP Delivers Executive Order Report to President

ACHP Seeks Public Input in Developing Comments on the Replacement of a Microwave Communications System in Mount Graham, Arizona (PDF)

2005

Federal Highway Administration wins Chairman's Award for Federal Achievement in Historic Preservaiton

Twenty-eight new *Preserve America* communities recognized

ACHP Closes Denver Office

Mrs. Laura Bush Presents "*Preserve America* History Teacher of the Year" Award to New Jersey Teacher

ACHP Business Meeting Notices/Historic Preservation Bulletin Board

ACHP Faults Navy Plan for Failure to Preserve Pensacola Historic Structures

Congress Passes Transportation Reauthorization Bill

ACHP to Consolidate Resources by Closing Colorado Field Office

HUD Wins ACHP Chairman's Award for Federal Achievement in Historic Preservation

Mrs. Laura Bush Announces New *Preserve America* Neighborhood Designation Program

New *Preserve America* Communities Recognized for Commitment to Historic Preservation

38 Historic Buildings Saved at Eisenhower VA Medical Center in Leavenworth, Kansas

Bureau of Land Management Wins ACHP Chairman's Award for Federal Achievement in Historic Preservation

Seven Maryland *Preserve America* Communities Designated, Recognized at ACHP Business Meeting

President and Mrs. Bush Present the 2005 *Preserve America* Presidential Awards

Chairman Nau Testifies on the National Historic Preservation Act

ACHP Objects to Courtyard Enclosure Plan for Old Patent Office Building

President Bush Requests $12.5 Million in *Preserve America* Grants

President Bush Announces Three Appointments to the ACHP

ACHP Adopts Preservation Easements Resolution and Interstate Highway Exemption

Navy Receives ACHP Chairman's Award for Saving Hotel Del Monte Buildings

Mrs. Laura Bush Designates Two Colorado Towns As *Preserve America* Communities

2004

NOAA and NPS Receive ACHP Chairman's Award

Five Virginia *Preserve America* Communities Receive Designation Certificates at ACHP Fall 2004 Business Meeting

Mrs. Laura Bush Designates 61 New *Preserve America* Communities

"Following the Smoke" Project Wins ACHP Chairman's Award

Section 106 Amendments Now in Effect

Mrs. Laura Bush Designates Corinth, Mississippi, a *Preserve America* Community

Blackstone River Valley Towns and Cities Designated Newest *Preserve America* Communities

Fifteen *Preserve America* Communities Designated in Texas

President and Mrs. Bush Present First *Preserve America* Presidential Awards

Mrs. Laura Bush Designates 31 *Preserve America* Communities in Kentucky

Agreement Signed on the Treatment of Federal Historic Properties along the Upper Missouri River

Historic Preservation Caucus Sponsors *Preserve America* Community Designation Event

ACHP Endorses Tourism Memorandum of Understanding

Blackstone River Valley Presents 24 *Preserve America* Community Applications to the ACHP

Laura Bush Announces *Preserve America* Grants Budget; First *Preserve America* Communities Also Announced

2003

Federal Emergency Management Agency and Its New York Partners Honored for Historic Preservation Efforts in Aftermath of World Trade Center Attack

Call for Public Comments on Amendments to Section 106 Regulations

Mrs. Laura Bush Announces *Preserve America* Community Designations, Presidential Awards

ACHP to Hold Public Meeting in Virginia on Corps of Engineers Chancellorsville Battleground Permit Issue

Call for Nominations for Chairman's Award for Federal Achievement in Historic Preservation

Preserve America Initiative Featured on June 4 Live Satellite Telecast

Three New Members Named to ACHP; New Members Are from Maryland, Colorado, and Minnesota

ACHP Chairman Nau Speaks on "The Economic Potential of Preserving America"

Economic Development Administration Receives Chairman's Preservation Award for Cumbres & Toltec Scenic Railroad

ACHP Receives "Excellence in Environmental Streamlining" Award from FHWA

ACHP Releases Upper Missouri River Corps of Engineers Historic Preservation Report

First Lady Laura Bush Launches Preserve America Initiative

President Bush Issues Executive Order on Preserve America

ACHP Chairman's Statement on Preserve America

Three ACHP Members Honored for Their Commitment to Historic Preservation

Federal Aviation Administration Receives Chairman's Historic Preservation Award for San Diego, Sitka, and Newark Projects

ACHP Chairman Nau Commends Mississippi Battlefield Preservation Effort

2002

Susan Schanlaber Receives Oath of Office for the Advisory Council on Historic Preservation

Emily Summers Receives Oath of Office for the Advisory Council on Historic Preservation

First Chairman's Awards for Federal Achievement in Historic Preservation Presented to General Services Administration and U.S. Fish and Wildlife Service

ACHP and NTHP to Present First Award for Federal Partnerships for Historic Preservation; Award Celebrates Raising of Hunley Submarine from Ocean Floor

Chairman Nau: "Preservation Is One Key to Salvation for Cities and History"

ACHP Chairman John L. Nau, III, Appointed to Presidential Task Force

Advisory Council on Historic Preservation and National Trust for Historic Preservation Honor Pentagon Renovation Efforts

President Bush Appoints Two New Members to ACHP

ACHP Endorses Florida Transportation Initiative to Improve Decisionmaking

ACHP Unveils New Guide to Historic Preservation Funding

New Guidelines Will Improve Historic Preservation at Hydroelectric Sites

ACHP Chairman Encourages Collaboration Between National Parks and Local Communities

Agreement Addresses Management of Navy Region Hawaii Historic Sites

Agreement Streamlines Review of Resource Conservation Activities

Hearing Held on Federal Management of Missouri River Historic Properties

ACHP Continues New Direction at Spring Business Meeting

ACHP Approves Streamlined Approach for Army Management of Historic Cold War Era Housing

Agreement Signed to Speed Grants to Historic Properties Near World Trade Center Site

Agreement Signed to Expedite Reviews for Washington Monument Security Enhancements

ACHP Streamlines Preservation Review for Historic Natural Gas Pipelines

New ACHP Program Direction Outlined in Chairman's Statement to House Appropriations Committee

NPS Endorses ACHP Policy Statement on Balancing Cultural and Natural Values

ACHP Chairman Calls for Better Partnerships to Promote Historic Preservation

ACHP Launches New Look and Organization at Winter 2002 Meeting

2001

Interim Guidance for Section 106 Cases Involving “No Historic Properties Affected” and “No Adverse Effect” Findings

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- **Executive Order 13287, Preserve America, Section 3 Reporting**
- **Laws and Authorities Related to NHPA**
- **ACHP Policy Statements**
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Working with Section 106

Section 106 Assistance for Users

Publications, guidance, opinions, and information to assist Section 106 users in applying the regulations.

Identifying ACHP Contacts for Section 106

The Office of Federal Agency Programs (OFAP) represents the ACHP in Section 106 cases. Use the OFAP Agency Organizational Chart to identify the appropriate OFAP contact for assistance with a Section 106 issue related to a specific federal agency. If you have an issue with an agency not listed on this chart, please contact Odette Williams, administrative assistant, at 202-606-8505 or owilliams@achp.gov.

OFAP is organized into two sections to address program and policy development in key areas. Use the OFAP Policy Organizational Chart to identify the appropriate section and point of contact in OFAP to address issues relating to these policy areas.

Protecting Historic Properties: A Citizen's Guide to Section 106 (2010 edition)

Section 106 Regulations (in PDF)

Text of ACHP's regulations, "Protection of Historic Properties" (36 CFR Part 800) *(incorporates amendments effective Aug. 5, 2004)*

Guidance on Coordinating NEPA and Section 106

The White House Council on Environmental Quality and the ACHP released a handbook designed to help coordinate required review processes under the National Historic Preservation Act and the National Environmental Policy Act. The handbook stands to significantly improve the coordination of environmental reviews across the government. This handbook provides practical advice to practitioners and stakeholders to improve the efficiency and effectiveness of federal agencies' environmental review.

ACHP *Case Digest*

Section 106 case highlights

Section 106 Archaeology Guidance

Section 213 Report

Renewable Energy and Historic Preservation

This web page serves as a central link to a range of resources regarding ACHP involvement and activities related to Renewable Energy and

Historic Preservation. This includes guidance memos, task force participation, and other relevant and important information to assist federal agencies, tribes, other stakeholders, and the public.

Review of Section 106 Regs Under E.O. 13563

Consistent with the requirements of Executive Order 13563, "Improving Regulation and Regulatory Review," the ACHP has completed a review of the regulations implementing Section 106 of the National Historic Preservation Act. The ACHP adopted a plan for completing this and future reviews on August 11, 2011. Read the plan. Read the summary of public comments and actions.

Program Alternatives – 36 CFR § 800.14

Nominate Your Federal Activity for the ACHP Chairman's Award for Federal Achievement in Historic Preservation

ACHP Native American Program: Guidance for Federal Agencies

Information for Federal agencies working with Native Americans in the Section 106 process

ACHP's Archeology Task Force

Guidance for archeology conducted under Section 106

Section 106 Training and Education

Information on ACHP training activities

Federal Historic Preservation Case Law, 1966-2000

Handbook of Federal historic preservation cases

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- **Federal Agency Section 3 Reports (EO 13287)**

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ACHP Office of Native American Affairs

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Training and Education

- **Section 106 Training**
- **Useful Resources on the Web**
- **International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM)**
- **Distance Learning**

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ACHP Publications

Preserve America Fact Sheet (2012)

Traditional Cultural Landscapes Action Plan (2012)

About the ACHP fact sheet (2011)

Office of Native American Affairs fact sheet (2011)

Section 106 fact sheet (2011)

Get Youth Involved to Build a Better Preservation Ethic - and Nation by Milford Wayne Donaldson, FAIA (2011)

Protecting Historic Properties: A Citizen's Guide to Section 106 Review (updated edition 2010)

About the ACHP Fact Sheet (2009)

Native American Fact Sheet (2009)

Preserve America HUD Fact Sheet (2009)

Preserve America Fact Sheet (2009)

Section 106 Fact Sheet (2009)

Section 106 Primer: Preserving America's Heritage (2010)

Preserve America Executive Order Report to the President (2009)

The Preserve America Executive Order: Report to the President (2007)

Becoming Better Stewards of Our Past: Recommendations for Enhancing Federal Management of Historic Properties (2004)

Heritage Tourism and the Federal Government: Summit II—Report of Proceedings (2003)

Heritage Tourism and the Federal Government: Summit I—Report of Proceedings (2002)

Heritage Tourism and the Federal Government: Northern New Mexico Perspectives (2002)

About the ACHP (2002)

Using Section 106 to Protect Historic Properties (2002)

Protecting Historic Properties: A Citizen's Guide to Section 106 Review

(2002)

Federal Historic Preservation Case Law, 1966-2000 (2001)

Caring for the Past, Managing for the Future: Federal Stewardship and America's Historic Legacy (full report) (2001)

Caring for the Past, Managing for the Future: Federal Stewardship and America's Historic Legacy (summary report) (2000)

Report to the President and Congress, 1998-1999 (2000)

Report to the President and Congress, 1996-1997 (1998)

Alternatives for Implementing Section 106 of the National Historic Preservation Act: An Assessment (1998)

Report Requested by the Committees on Appropriations (1996)

Defense Department Compliance with the National Historic Preservation Act: Section 202(a)(6) Evaluation Report (1994)

Balancing Historic Preservation Needs with the Operation of Highly Technical or Scientific Facilities (1991)

Balancing Assessing the Energy Conservation Benefits of Historic Preservation: Methods and Examples (1979)

Please visit the links above for each publication's ordering information.

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Antiquities Act of 1906

AS AMENDED

This Act became law on June 8, 1906 (34 Stat. 225, 16 U.S.C. 431-433) and has been amended once. This description of the Act, as amended, tracks the language of the United States Code except that (following common usage) we refer to the "Act" (meaning the Act, as amended) rather than to the "subchapter" or the "title" of the Code.

16 U.S.C. 433, Penalties for damage, destruction, etc. of antiquities

Section 1

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

16 U.S.C. 431, Proclamation of national monuments, reservation of lands, etc.

Section 2

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in [sic] behalf of the Government of the United States.

16 U.S.C. 431a, Limitation on more national monuments in Wyoming

No further extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.

16 U.S.C. 432, Permits for excavation, etc.

Section 3

Permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and Army to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulation as they may prescribe: *Provided,* That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

16 U.S.C. 432, Rules and regulations

Section 4

The Secretaries of the departments aforesaid shall make and publish from time to time uniform rules and regulations for the purpose of carrying out the provisions of this Act.

Historic Sites Act of 1935

16 U.S.C. sec. 461-467

Sec. 461. Declaration of national policy

It is declared that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States. (Aug. 21, 1935, ch. 593, sec. 1,49 Stat. 666.)

Sec. 462. Administration by Secretary of the Interior; powers and duties enumerated

The Secretary of the Interior (hereinafter in sections 461 to 467 of this title referred to as the Secretary), through the National Park Service, for the purpose of effectuating the policy expressed in section 461 of this title, shall have the following powers and perform the following duties and functions:

(a) Secure, collate, and preserve drawings, plans, photographs, and other data of historic and archaeologic sites, buildings, and objects.

(b) Make a survey of historic and archaeologic sites, buildings, and objects for the purpose of determining which possess exceptional value as commemorating or illustrating the history of the United States.

(c) Make necessary investigations and researches in the United States relating to particular sites, buildings, or objects to obtain true and accurate historical and archaeological facts and information concerning the same.

(d) For the purpose of sections 461 to 467 of this title, acquire in the name of the United States by gift, purchase, or otherwise any property, personal or real, or any interest or estate therein, title to any real property to be satisfactory to the Secretary: Provided, That no such property which is owned by any religious or educational institution, or which is owned or administered for the benefit of the public shall be so acquired without the consent of the owner: Provided further, That no such property shall be acquired or contract or agreement for the acquisition thereof made which will obligate the general fund of the Treasury for the payment of such property, unless or until Congress has appropriated money which is available for that purpose.

(e) Contract and make cooperative agreements with States, municipal subdivisions, corporations, associations, or individuals, with proper bond where deemed advisable, to protect, preserve, maintain, or operate any historic or archaeologic building, site, object, or property used in connection therewith for public use, regardless as to whether the title thereto is in the United States: Provided, That no contract of cooperative agreement shall be made or entered into which will obligate the general fund of the Treasury unless or until Congress has appropriated money for such purpose.

(f) Restore, reconstruct, rehabilitate, preserve, and maintain historic or prehistoric sites, buildings, objects, and properties of national historical or archaeological significance and where deemed desirable establish and maintain museums in connection therewith.

(g) Erect and maintain tablets to mark or commemorate historic or prehistoric places and events of national historical or archaeological significance.

(h) Operate and manage historic and archaeologic sites, buildings, and properties acquired under the provisions of sections 461 to 467 of this title together with lands and subordinate buildings for the benefit of the public, such authority to include the power to charge reasonable visitation fees and grant concessions, leases, or permits for the use of land, building space, roads, or trails when necessary or

desirable either to accommodate the public or to facilitate administration: Provided, That the Secretary may grant such concessions, leases, or permits and enter into contracts relating to the same with responsible persons, firms, or corporations without advertising and without securing competitive bids.

463. National Park System Advisory Board

(a) Establishment; composition; duties
A general advisory board to be known as the National Park System Advisory Board is hereby established, to be composed of not to exceed sixteen persons, citizens of the United States who have a demonstrated commitment to the National Park System, to include but not be limited to representatives competent in the fields of history, archaeology, architecture, anthropology, biology, geology, and related disciplines, who shall be appointed by the Secretary for a term not to exceed four years. The Secretary shall take into consideration nominations for appointees from public and private, professional, civic, and educational societies, associations, and institutions. The members of such board shall receive no salary but may be paid expenses incidental to travel when engaged in discharging their duties as members. It shall be the duty of such board to advise the Secretary on matters relating to the National Park System, to other related areas, and to the administration of sections 461 to 467 of this title, including but not limited to matters submitted to it for consideration by the Secretary, but it shall not be required to recommend as to the suitability or desirability of surplus real and related personal property for use as an historic monument. Such board shall also provide recommendations on the designation of national historic landmarks and national natural landmarks. Such board is strongly encouraged to consult with the major scholarly and professional organizations in the appropriate disciplines in making such recommendations.

(b) Termination
The National Park System Advisory Board shall continue to exist until January 1, 1995. The provisions of section 14(b) of the Federal Advisory Committee Act (the Act of October 6, 1972; 86 Stat. 776) are hereby waived with respect to the Board, but in all other respects, it shall be subject to the provisions of the Federal Advisory Committee Act.

(c) National Park Service Advisory Council
There is hereby established the National Park Service Advisory Council (hereafter in this section referred to as the "advisory council") which shall provide advice and counsel to the National Park System Advisory Board. Membership on the advisory council shall be limited to those individuals whose term on the advisory board has expired. Such individuals may serve as long as they remain active except that not more than 12 members may serve on the advisory council at any one time. Members of the advisory council shall not have a vote on the National Park System Advisory Board. Members of the advisory council shall receive no salary but may be paid expenses incidental to travel when engaged in discharging their duties as members. Initially, the Secretary shall choose 12 former members of the Advisory Board to constitute the advisory council. In so doing, the Secretary shall consider their professional expertise and demonstrated commitment to the National Park System and to the Advisory Board.

464. Cooperation with governmental and private agencies

(a) (FOOTNOTE 1) Authorization
(FOOTNOTE 1) Subsection designation "(a)" supplied.

The Secretary, in administering sections 461 to 467 of this title, is authorized to cooperate with and may seek and accept the assistance of any Federal, State, or municipal department or agency, or any educational or scientific institution, or any patriotic association, or any individual.

(b) Advisory committees
When deemed necessary, technical advisory committees may be established to act in an advisory capacity in connection with the restoration or reconstruction of any historic or prehistoric building or structure.

(c) Employment of assistance
Such professional and technical assistance may be employed, and such service may be established as may be required to accomplish the purposes of sections 461 to 467 of this title and for which money may be appropriated by Congress or made available by gifts for such purpose.

465. Jurisdiction of States in acquired lands

Nothing in sections 461 to 467 of this title shall be held to deprive any State, or political subdivision thereof, of

its civil and criminal jurisdiction in and over lands acquired by the United States under said sections.

466. Requirement for specific authorization

(a) In general
Except as provided in subsection (b) of this section, notwithstanding any other provision of law, no funds appropriated or otherwise made available to the Secretary of the Interior to carry out section 462(e)or 462(f) of this title may be obligated or expended after October 30, 1992 -

(1) unless the appropriation of such funds has been specifically authorized by law enacted on or after October 30, 1992; or

(2) in excess of the amount prescribed by law enacted on or after October 30, 1992.

(b) Savings provision
Nothing in this section shall prohibit or limit the expenditure or obligation of any funds appropriated prior to January 1, 1993.

(c) Authorization of appropriations
Except as provided by subsection (a) of this section, there is authorized to be appropriated for carrying out the purposes of sections 461 to 467 of this title such sums as the Congress may from time to time determine.

467. Conflict of laws

The provisions of sections 461 to 467 of this title shall control if any of them are in conflict with any other Act or Acts relating to the same subject matter.

National Park Service
National Park Service
U.S. Department of the Interior

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HPS Heritage Preservation Services

United States Code

Title 16 - Conservation

Chapter 1a - Historic Sites, Buildings, Objects, and Antiquities

SubChapter I - General Provisions

Archaeological and Historic Preservation Act of 1974

§ 469. Purpose
§ 469a. Notice to Secretary of the Interior
§ 469a-1. Data Recovery
§ 469a-2. Survey by Secretary of the Interior; data recovery; compensation for delays and temporary loss of use of land
§ 469a-3. Progress reports by Secretary of the Interior; disposition of relics and specimens; coordination of survey and recovery activities; annual report
§ 469b. Contracts or agreements; services of experts, consultants, or organizations; acceptance of funds
§ 469c. Use of project funds
§ 469c-1. "State" defined
§ 469c-2. Costs with respect to historic properties

§ 469. Preservation of historical and archeological data threatened by dam construction or alterations of terrain

It is the purpose of sections 469 to 469c-1 of this title to further the policy set forth in sections 461 to 467 of this title, by specifically providing for the preservation of historical and archeological data (including relics and specimens) which might otherwise be irreparably lost or destroyed as the result of (1) flooding, the building of access roads, the erection of workmen's communities, the relocation of railroads and highways, and other alterations of the terrain caused by the construction of a dam by any agency of the United States, or by any private person or corporation holding a license issued by any such agency or (2)any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program.

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§ 469a. Notice of dam construction to be given Secretary of the Interior by United States agencies

Before any agency of the United States shall undertake the construction of a dam, or issue a license to any private individual or corporation for the construction of a dam, it shall give written notice to the Secretary of the Interior (hereafter referred to as the Secretary) setting forth the site of the proposed dam and the approximate area to be flooded and otherwise changed if such construction is undertaken: Provided, That with respect to any flood water retarding dam which provides less than five thousand acre-feet of detention capacity and with respect to any other type of dam which creates a reservoir of less than forty surface acres the provisions of this section shall apply only when the constructing agency, in its preliminary surveys, finds, or is presented with evidence that historical or archeological materials exist or may be present in the proposed reservoir area.



§ 469a-1. Threat of irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data by Federal construction projects; notice to Secretary of the Interior; survey; recovery, preservation, and protection of data

- (a) Notification and request for preservation of data

  Whenever any Federal agency finds, or is notified, in writing, by an appropriate historical or archeological authority, that its activities in connection with any Federal construction project or federally licensed project, activity, or program may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data, such agency shall notify the Secretary, in writing, and shall provide the Secretary with appropriate information concerning the project, program, or activity. Such agency may request the Secretary to undertake the recovery, protection, and preservation of such data (including preliminary survey, or other investigation as needed, and analysis and publication of the reports resulting from such investigation), or it may, with funds appropriated for such project, program, or activity, undertake such activities. Copies of reports of any investigations made pursuant to this section shall be submitted to the Secretary, who shall make them available to the public for inspection and review.

- (b) Survey of site; preservation of data; compensation

  Whenever any Federal agency provides financial assistance by loan, grant, or otherwise to any private person, association, or public entity, the Secretary, if he determines that significant scientific, prehistorical, historical, or archeological data might be irrevocably lost or destroyed, may with funds appropriated expressly for this purpose conduct, with the consent of all persons, associations, or public entities having a legal interest in the property involved, a survey of the affected site and undertake the recovery, protection, and preservation of such data (including analysis and publication). The Secretary shall, unless otherwise mutually agreed to in writing, compensate any person, association, or

public entity damaged as a result of delays in construction or as a result of the temporary loss of the use of private or any nonfederally owned lands.

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§ 469a-2. Survey by Secretary of the Interior; recovery and preservation of data; compensation for delays in construction and for temporary loss of use of land

- (a) Survey conducted; preservation of data

  The Secretary, upon notification, in writing, by any Federal or State agency or appropriate historical or archeological authority that scientific, prehistorical, historical, or archeological data is being or may be irrevocably lost or destroyed by any Federal or federally assisted or licensed project, activity, or program, shall, if he determines that such data is significant and is being or may be irrevocably lost or destroyed and after reasonable notice to the agency responsible for funding or licensing such project, activity, or program, conduct or cause to be conducted a survey and other investigation of the areas which are or may be affected and recover and preserve such data (including analysis and publication) which, in his opinion, are not being, but should be, recovered and preserved in the public interest.

- (b) Emergency projects

  No survey or recovery work shall be required pursuant to this section which, in the determination of the head of the responsible agency, would impede Federal or federally assisted or licensed projects or activities undertaken in connection with any emergency, including projects or activities undertaken in anticipation of, or as a result of, a natural disaster.

- (c) Initiation of survey

  The Secretary shall initiate the survey or recovery effort within sixty days after notification to him pursuant to subsection (a) of this section or within such time as may be agreed upon with the head of the agency responsible for funding or licensing the project, activity, or program in all other cases.

- (d) Compensation by Secretary

  The Secretary shall, unless otherwise mutually agreed to in writing, compensate any person, association, or public entity damaged as a result of delays in construction or as a result of the temporary loss of the use of private or nonfederally owned land.

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§ 469a-3. Progress reports by Secretary of the Interior on surveys and work undertaken as result of surveys; disposition of relics and specimens

recovered; coordination of survey and recovery activities; annual report

- (a) Progress reports to funding or licensing agency

  The Secretary shall keep the agency responsible for funding or licensing the project notified at all times of the progress of any survey made under sections 469 to 469c of this title or of any work undertaken as a result of such survey, in order that there will be as little disruption or delay as possible in the carrying out of the functions of such agency and the survey and recovery programs shall terminate at a time mutually agreed upon by the Secretary and the head of such agency unless extended by mutual agreement.

- (b) Disposition of relics and specimens

  The Secretary shall consult with any interested Federal and State agencies, educational and scientific organizations, and private institutions and qualified individuals, with a view to determining the ownership of and the most appropriate repository for any relics and specimens recovered as a result of any work performed as provided for in this section.

- (c) Coordination of activities; annual report

  The Secretary shall coordinate all Federal survey and recovery activities authorized under sections 469 to 469c-1 of this title and shall submit an annual report at the end of each fiscal year to the Committee on Natural Resources of the House of Representatives and Committee on Energy and Natural Resources of the Senate indicating the scope and effectiveness of the program, the specific projects surveyed and the results produced, and the costs incurred by the Federal Government as a result thereof.

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§ 469b. Administration; contracts or agreements; services of experts, consultants, or organizations; acceptance of funds

In the administration of sections 469 to 469c-1 of this title, the Secretary may -

- (1) enter into contracts or make cooperative agreements with any Federal or State agency, any educational or scientific organization, or any institution, corporation, association, or qualified individual; and

- (2) obtain the services of experts and consultants or organizations thereof in accordance with section 3109 of title 5; and

- (3) accept and utilize funds made available for salvage archeological purposes by any private person or corporation or transferred to him by any Federal agency.

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§ 469c. Assistance to Secretary of the Interior by Federal agencies responsible for construction projects; authorization of appropriations

- (a) Assistance of Federal agencies

  To carry out the purposes of sections 469 to 469c-1 of this title, any Federal agency responsible for a construction project may assist the Secretary and/or it may transfer to him such funds as may be agreed upon, but not more than 1 per centum of the total amount authorized to be appropriated for such project, except that the 1 per centum limitation of this section shall not apply in the event that the project involves $50,000 or less: Provided, That the costs of such survey, recovery, analysis, and publication shall be considered nonreimbursable project costs.

- (b) Authorization of appropriations for preservation of data

  For the purposes of section 469a-1(b) of this title, there are authorized to be appropriated such sums as may be necessary, but not more than $500,000 in fiscal year 1974; $1,000,000 in fiscal year 1975; $1,500,000 in fiscal year 1976; $1,500,000 in fiscal year 1977; $1,500,000 in fiscal year 1978; $500,000 in fiscal year 1979; $1,000,000 in fiscal year 1980; $1,500,000 in fiscal year 1981; $1,500,000 in fiscal year 1982; and $1,500,000 in fiscal year 1983.

- (c) Authorization of appropriations for surveys and investigations

  For the purposes of section 469a-2(a) of this title, there are authorized to be appropriated not more than $2,000,000 in fiscal year 1974; $2,000,000 in fiscal year 1975; $3,000,000 in fiscal year 1976; $3,000,000 in fiscal year 1977; $3,000,000 in fiscal year 1978; $3,000,000 in fiscal year 1979; $3,000,000 in fiscal year 1980; $3,500,000 in fiscal year 1981; $3,500,000 in fiscal year 1982; and $4,000,000 in fiscal year 1983.

- (d) Availability of appropriations

  Beginning fiscal year 1979, sums appropriated for purposes of this section shall remain available until expended.

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§ 469c-1. "State" defined

As used in sections 469 to 469c-1 of this title, the term "State" includes the several States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

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§ 469c-2. Costs for identification, surveys, evaluation and data recovery with respect to historic properties

Notwithstanding section 469c(a) of this title, or any other provision of law to the contrary -

- (1) identification, surveys, and evaluation carried out with respect to historic properties within project areas may be treated for purposes of any law or rule of law as planning costs of the project and not as costs of mitigation;
- (2) reasonable costs for identification, surveys, evaluation, and data recovery carried out with respect to historic properties within project areas may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit; and
- (3) Federal agencies, with the concurrence of the Secretary and after notification of the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate, are authorized to waive, in appropriate cases, the 1 per centum limitation contained in section 469c(a) of this title.

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Archaeological Resources Protection Act of 1979

Archaeological Resources Protection Act of 1979

AN ACT To protect archaeological resources on public lands and Indian lands, and for other purposes.

Be it enacted of the Senate and the house of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Archaeological Resources Protection Act of 1979".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that-

(1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;

(2) these resources are increasingly endangered because of their commercial attractiveness;

(3) existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and

(4) there is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.

(b) The purpose of this Arct is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of info rmation between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this Act.

DEFINITIONS

SEC. 3. As used in this Act-

(1) The term "archaeological resource" means any material remains of past human life or actiivities which are of archaeological interest, as determined under the uniform regulations promulgated pursuant to this Act. Such regulations containing such d etermination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological spcimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeologic al context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

(2) The term "Federal land manager" means, with respect to any public lands, the Secretary of the department, or the head of any other agency or instrumentality of the United States, having primary

management authority over such lands. In the case of any public lands or Indian lands with respect to which no department, agency, or instrumentality has primary management authority, such term means the Secretary of the Interior. If the Secretary of the Interior consents, the responsibilities (in whole or in part) under this Arct of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary of the Interior with respect to any land managed by such other Secretary or agency head, and in any such case, the term "Federal land manager" means the Secretary of the Interior.
(3) The term "public lands" means-
(A) lands which are owned and administered by the United States as part of -

(i) the national park system,
(ii) the national wildlife refuge system, or
(iii) the national forest system; and

(B) all other lands the fee title to which is held by the United States, other than lands on the Outer Continental Shelf and lands which are under the jurisdication of the Smithsonian Institution;
(4) The term "Indian lands" means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for any subsurface interest in lan ds not owned or controlled by an Indian tribe or an Indian individual.
(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in, or established pursuant to, the Alaska Native Claims Settlem ent Act (85 Stat. 688).
(6) The term "person" means an individual, corporation, partnership, trust, institution, association, or any other private entity or any officer, employee, agent, department, or instrumentality of the United States, of any Indian tribe, or of any Stat e or political subdivision thereof.
(7) The term "State" means any of the fifty States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

EXCAVATION AND REMOVAL

SEC. 4. (a) Any person may apply to the Federal land manager for a permit to excavate or remove any archaeological resource located on public lands or Indian lands and to carry out activities associated with such excavation or removal. The application sh all be required, under uniform regulations under this Act, to contain such information as the Federal land manager deems necessary, includgin information concerning the time, scope, and location and specific purpose of the proposed work.
(b) A permit may be issued pursuant to an application under subsection (a) if the Federal land manager determines, pursuant to uniform regulations under this Act, that-

(1) the applicant is qualified, to carry out the permitted activity,
(2) the activity is undertaken for the purpose of furthering archaeological knowledge in the public interest,
(3) the archaeological resources which are excavated or removed from public lands will remain the property of the United States, and such resources and copies of associated archaeological records and data will be preserved by a suitable university, mu seum, or other scientific or educational institution, and
(4) the activity pursuant to such permit is not inconsistent with any management plan applicable to the public lands concerned.

(c) If a permit issued under this section may rsult in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land

manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 9.
(d) Any permit under this section shall contain terms and conditions, pursuant to uniform regulations promulgated under this Act, as the Federal land manager concerned deems necessary to carry out the purposes of this Act.
(e) Each permit under this section shall identify the individual who shall be responsible for carrying out the terms and conditions of the permit and for otherwise complying with this Act and other law applicable to the permitted activity.
(f) Any permit issued under this section may be suspended by the Federal land manager upon his determination that the permittee has violated any provision of subsection (a), (b), or (c) of section 6. Any such permit may be revoked by such Federal lan d manager upon assessment of a civil penalty under section 7 against the permittee or upon hte permittee's conviction under section 6.)(g)(1) No permit shall be required under this section or under the Act of June 8, 1906 (16 U.S.C. 431), for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe, e xcept that in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this section.
(2) In the case of any permits for the excavation or removal of any archaeological resources located on Indian lands, the permit may be granted only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such land s. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe.
(h)(1) No permit or other permission shall be required under the Act of June 8, 1906 (16 U.S.C. 431-433), for any activity for which a permit is issued under this section.
(2) Any permit issued under the Act of June 8, 1906, shall remain in effect according to its terms and conditions following the enactment of this Act. No permit shall be required to carry out any activity under a permit issued under the Act of June 8 , 1906, before the date of the enactment of this Act which remains in effect as provided in this paragraph, and nothing in this Act shall modify or affect any such permit.
(i) Isssuance of a permit in accordance with this section and applicable regulations shall not require compliance with section 106 of the Act of October 15, 1966 (80 Stat. 917, 16 U.S.C. 470f).
(j) Upon the written request of the Governor of any State, the Federal land manager shall issue a permit, subject to the provisions of subsections (b)(3), (b)(4), (c), (e), (f), (g), (h), and (i) of this section for the purpose of conducting archaeolo gical research, excavation, removal, and curation, on behalf of the State or its eduational institutions, to such Governor or to such designee as the Governor deems qualified to carry out the intent of this Act.

CUSTODY OF RESOURCES

Sec. 5. The Secretary of the Interior may promulgate regulations providing for-
(1) the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from public lands and Indian lands pursuant to this Act, and
(2) the ultimate disposition of such resources and other resources removed pursuant to the Act of June 27, 1960 (16 U.S.C. 469-469c) or the Act of June 8, 1906 (16 U.S.C. 431-433). Any exchange or ultimate disposition under such regulation of archaeological rsources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands . Following promulgation of regulations, under this section, notwithstanding any other provision of law, such regulations shall govern the disposition of archaeological resources removed from public lands and Indian lands pursuant to this Act.

PROHIBITED ACTS AND CRIMINAL PENALTIES

Sec. 6. (a) No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 4, a permit referred to in section 4(h)(2), or the exemption contained in section 4(g)(1).
(b)No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of-

(1) the prohibition contained in subsection (a), or
(2) any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

(c) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource secavated, removed, sold, purchased, exchanged, transported, or received in violati on of any provision, rule, regulation, ordinance, or permit in effect under State or local law.
(d) Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be fined not more than $10,000 or imprison ed not more than one year, or both: *Provided, however*, That if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $5,000, such person shall be fined not more than $20,000 or imprisoned not more than two years, or both. In the case of a second or subsequent such violation upon conviction such person shall be fined not more than $100,000, or imprisoned not more than five years, or both.
(e) The prohibitions contained in this section shall take effect on the date of the enactment of this Act.
(f) Nothing in subsection (b)(1) of this section shall be deemed applicable to any person with respect to an archaeological resource which was in the lawful possession of such person prior to the date of the enactment of this Act.
(g) Nothing in subsection (d) of this section shell be deemed applicable to any person with respect to the removal of arrowheads located on the surface of the ground.

CIVIL PENALTIES

Sec. 7. (a)(1) Any person who violates any prohibition contained in an applicable regulation or permit issued under this Act may be assessed a civil penalty by the Federal land manager concerned. No penalty may be assessed under this subsection unless su ch person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Federal land manager concerned.
(2) The amount of such penalty shall be determined under regulation promulgated pursuant to this Act, taking into account, in addition to other factors-

(A) the archaeological or commercial value of the archaeological resource involved, and
(B) the cost of restoration and repair of the resource and the archaeological site involved.

Such regulations shall provide that, in the case of a second or subsequent violation by any person, the amount of such civil penalty may be ouble the amount which would have been assessed if such violation were the first violation by such person. The amo unt of any penalty assessed under this subsection for any violation shall not exceed an amount equal to double the cost of restoration and repair of resources and archaeological sites damaged and double the fair market value of resources

destroyed or not recovered.
(3) No penalty shall be assessed under this section for the removal of arrowheads located on the surface of the ground.
(b)(1) Any person aggrieved by an order assessing a civil penalty under subsection (a) may file a petition for judicial review of such order with the United States District Court for the District of Columbia or for any other district in which such a p erson resides or transacts business. Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued. The court shall hear such action on the record made before the Federal land manager and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.
(2) If any person fails to pay an assessment of a civil penalty-

> (A) after the order making the assessment has become a final order and such person has not filed a petition for judicial review of the order in accordance with paragraph (1), or
> (B) after a court in an action brought under paragraph (1) has entered a final judgment upholding the assessment of a civil penalty,

the Federal land managers may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. In such action, the validity and amount of such penalty shall not be subject to review.
(c) Hearings held during proceedings for the assessment of civil penalties authorized by subsection (a) shall be conducted in accordance with section 554 of title 5 of the United States Code. The Federal land manager may issue subpenas for the attend ance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contu macy or refusal to obey a subpena served upon any person pursuant to this paragraph, the district court of the United States for any distrcit in which such person is found or resides or transacts business, upon application by the United States and after n otice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Federal land manager or to appear and produce documents before the Federal land manager, or both, and any failure to obey such od er of the court may be punished by such court as a contempt thereof.

REWARDS; FORFEITURE

Sec. 8. (a) Upon the certification of the Federal land manager concerned, the Secretary of the Treasury is directed to pay from penalties and fines collected under sections 6 and 7 an amount equal to one-half of such penalty or fine, but not to exceed $50 0, to any person who furnishes information which leads to the finding of a civil violation, or the conviction of criminal violation, with respect to which such penalty or fine was paid. If several persons provided such information, such amount shall be d ivided among such persons. No officer or employee of the United States or of any service in the performance of his official duties shell be eligible for payment under this subsection.
(b) All archaeological resources with respect to which a violation of subsection (a), (b), or (c) of section 6 occurred and which are in the possession of any person, and all vehicles and equipment of any person which were used in connection with such violation, may be (in the discretion of the court or administrative law judge, as the case may be(subject to forfeiture to the United States upon-

> (1) such person's conviction of such violation under section 6,
> (2) assessment of a civil penalty against such person under section 7 with respect to such violation, or
> (3) a determination of any court that such archaeological resources, vehicles, or

equipment were involved in such violation.

(c) In cases in which a violation of the prohibition contained in subsection (a), (b), or (c) of section 6 involve archaeological resources excavated or removed from Indian lands, the Federal land manager or the court, as the case may be, shall provid e for the payment to the Indian or INdian tribe involved of all penalties collected pursuant to section 7 and for the transfer to such Indian or Indian tribe of all items forfeited under this section.

CONFIDENTIALITY

Sec. 9. (a) Information concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under this Act or under any other provision of Federal law may not be made available to the public under subchapter II of chapter 5 of title 5 of the United States Code or under any other provision of law unless the Federal land manager concerned determines that such disclosure would-

(1) further the purposes of this Act or the Act of June 27, 1960 (16 U.S.C. 469-469c), and
(2) not create a risk of harm to such resources or to the site at which such resources are located.

(b) Notwithstanding the provisions of subsectoin (a), upon the written request of the Governor of any State, which request shall state-

(1) the specific site or area for which information is sought,
(2) the purpose for which such information is sought,
(3) a commitment by the Governor to adequately protect the confidentiality of such information to protect the resource from commercial exploitation,

the Federal land manager concerned shall provide to the Governor information concerning the nature and location of archaeological resources within the State of the requesting Governor.

REGULATIONS; INTERGOVERNMENTAL COORDINATION

Sec 10. (a) The Secretaries of the Interior, Agriculture and Defense and the Chairman of the Board of the Tennessee Valley Authority, after public notice and hearing, shall promulgate such uniform rules and regulations as may be appropriate to carry out t he purposes of this Act. Such rules and regulations may be promulgated only after consideration of the provisions of the American Indian Religious Freedom Act (92 Stat. 469; 42 U.S.C. 1996). Each uniform rule or regulation promulgated under this Act sha ll be submitted on the same calendar day to the Committee on Energy and Natural Resources of the United States Senate and to the Committee on Interior and Insular Affairs of the United States House of Representatives, and no such uniform rule or regulatio n may take effect before the expiration of a period of ninety calendar days following the date of its submission to such Committees.
(b) Each Federal land manager shall promulgate such rules and regulations under subsection (a), as may be appropriate for the carrying out of his functions and authorities under this Act.

COOPERATION WITH PRIVATE INDIVIDUALS

Sec. 11. The Secretary of the Interior shall take such action as may be necessary, consistent with the purposes of this Act, to foster and improve the communication, cooperation, and exchange of information between-

(1) private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this Act, and
(2) Federal authorities responsible for the protection of archaeological resources on the public lands and Indian lands and professional archaeologists and associations of professional archaeologists.

In carrying out this section, the Secretary shall, to the extent practicable and consistent with the provisions of this Act, make efforts to expand the archaeological data base for the archaeological resources of the United States through increased cooper ation between private individuals referred to in paragraph (1) and professional archaeologists and archaeological organizations.

SAVINGS PROVISIONS

Sec. 12. (a) Nothing in this Act shall be construed to repeal, modify, or impose additional restrictions on the activites permitted under existing laws and authorities relating to mining, mineral leasing, reclamation, and other multiple uses of the public lands.
(b) Nothing in this Act applies to, or requires a permit for, the collection for private purposes of any rock, coin, bullet, or mineral which is not an archaeological resource, as determined under uniform regulations promulgated under section 3(1).
(c) Nothing in this Act shall be construed to affect any land other than public land or Indian land or to affect the lawful recovery, collection, or sale of archaeological resources from land other than public land or Indian land.

REPORT

Sec. 13. As part of the annual report required to be submitted to the specified committees of the Congress pursuant to section 5(c) of the Act of June 27, 1960 (74 Stat. 220; 16 U.S.C. 469-469a), the Secretary of the Interior shall comprehensively report as a separate component on the activities carried out under the provisions of this Act, and he shall make such reommendations as he deems appropriate as to changes or improvements needed in the provisions of this Act. Such report shall include a brief su mmary of the actions undertaken by the Secretary under section 11 of this Act, relating to cooperation with private individuals.

The National Environmental Policy Act of 1969, as amended

(Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970, as amended by Pub. L. 94-52, July 3, 1975, Pub. L. 94-83, August 9, 1975, and Pub. L. 97-258, § 4(b), Sept. 13, 1982)

An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969."

Purpose

Sec. 2 [42 USC § 4321].

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 [42 USC § 4331].

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102 [42 USC § 4332].

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local

agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103 [42 USC § 4333].

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for

the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104 [42 USC § 4334].

Nothing in section 102 [42 USC § 4332] or 103 [42 USC § 4333] shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105 [42 USC § 4335].

The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201 [42 USC § 4341].

The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban an rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202 [42 USC § 4342].

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

Sec. 203 [42 USC § 4343].

(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

(b) Notwithstanding section 1342 of Title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

Sec. 204 [42 USC § 4344].

It shall be the duty and function of the Council --

1. to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 [42 USC § 4341] of this title;

2. to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

3. to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

4. to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

5. to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

6. to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

7. to report at least once each year to the President on the state and condition of the environment; and

8. to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205 [42 USC § 4345].

In exercising its powers, functions, and duties under this Act, the Council shall --

1. consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order No. 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture,

labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

2. utilize, to the fullest extent possible, the services, facilities and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206 [42 USC § 4346].

Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates [5 USC § 5313]. The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates [5 USC § 5315].

Sec. 207 [42 USC § 4346a].

The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

Sec. 208 [42 USC § 4346b].

The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

Sec. 209 [42 USC § 4347].

There are authorized to be appropriated to carry out the provisions of this chapter not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

The Environmental Quality Improvement Act, as amended (Pub. L. No. 91- 224, Title II, April 3, 1970; Pub. L. No. 97-258, September 13, 1982; and Pub. L. No. 98-581, October 30, 1984.

42 USC § 4372.

(a) There is established in the Executive Office of the President an office to be known as the Office of Environmental Quality (hereafter in this chapter referred to as the "Office"). The Chairman of the Council on Environmental Quality established by Public Law 91-190 shall be the Director of the Office. There shall be in the Office a Deputy Director who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The compensation of the Deputy Director shall be fixed by the President at a rate not in excess of the annual rate of compensation payable to the Deputy Director of the Office of Management and Budget.

(c) The Director is authorized to employ such officers and employees (including experts and consultants) as may be necessary to enable

the Office to carry out its functions ;under this chapter and Public Law 91-190, except that he may employ no more than ten specialists and other experts without regard to the provisions of Title 5, governing appointments in the competitive service, and pay such specialists and experts without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but no such specialist or expert shall be paid at a rate in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of Title 5.

(d) In carrying out his functions the Director shall assist and advise the President on policies and programs of the Federal Government affecting environmental quality by --

1. providing the professional and administrative staff and support for the Council on Environmental Quality established by Public Law 91- 190;

2. assisting the Federal agencies and departments in appraising the effectiveness of existing and proposed facilities, programs, policies, and activities of the Federal Government, and those specific major projects designated by the President which do not require individual project authorization by Congress, which affect environmental quality;

3. reviewing the adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources;

4. promoting the advancement of scientific knowledge of the effects of actions and technology on the environment and encouraging the development of the means to prevent or reduce adverse effects that endanger the health and well-being of man;

5. assisting in coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality;

6. assisting the Federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established throughout the Federal Government;

7. collecting, collating, analyzing, and interpreting data and information on environmental quality, ecological research, and evaluation.

(e) The Director is authorized to contract with public or private agencies, institutions, and organizations and with individuals without regard to section 3324(a) and (b) of Title 31 and section 5 of Title 41 in carrying out his functions.

42 USC § 4373. Each Environmental Quality Report required by Public Law 91-190 shall, upon transmittal to Congress, be referred to each standing committee having jurisdiction over any part of the subject matter of the Report.

42 USC § 4374. There are hereby authorized to be appropriated for the operations of the Office of Environmental Quality and the Council on Environmental Quality not to exceed the following sums for the following

fiscal years which sums are in addition to those contained in Public Law 91-190:

(a) $2,126,000 for the fiscal year ending September 30, 1979.

(b) $3,000,000 for the fiscal years ending September 30, 1980, and September 30, 1981.

(c) $44,000 for the fiscal years ending September 30, 1982, 1983, and 1984.

(d) $480,000 for each of the fiscal years ending September 30, 1985 and 1986.

42 USC § 4375.

(a) There is established an Office of Environmental Quality Management Fund (hereinafter referred to as the "Fund") to receive advance payments from other agencies or accounts that may be used solely to finance --

1. study contracts that are jointly sponsored by the Office and one or more other Federal agencies; and

2. Federal interagency environmental projects (including task forces) in which the Office participates.

(b) Any study contract or project that is to be financed under subsection (a) of this section may be initiated only with the approval of the Director.

(c) The Director shall promulgate regulations setting forth policies and procedures for operation of the Fund.

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Native American Graves Protection and Repatriation Act
AS AMENDED

This Act became law on November 16, 1990 (Public Law 101-601; 25 U.S.C. 3001 et seq.) and has been amended twice. This description of the Act, as amended, tracks the language of the United States Code except that (following common usage) we refer to the "Act" (meaning the Act, as amended) rather than to the "subchapter" or the "title" of the Code.

25 U.S.C. 3001, Definitions

Section 2

For purposes of this Act, the term—

(1) **"burial site"** means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

(2) **"cultural affiliation"** means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

(3) **"cultural items"** means human remains and—

(A) **"associated funerary objects"** which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

(B) **"unassociated funerary objects"** which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

(C) **"sacred objects"** which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) **"cultural patrimony"** which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

(4) **"Federal agency"** means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.

(5) **"Federal lands"** means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. 1601 et seq.].

(6) **"Hui Malama I Na Kupuna O Hawai'i Nei"** means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) **"Indian tribe"** means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(8) **"museum"** means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.

(9) **"Native American"** means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) **"Native Hawaiian"** means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) **"Native Hawaiian organization"** means any organization which—

(A) serves and represents the interests of Native Hawaiians,

(B) has as a primary and stated purpose the provision of services to Native Hawaiians, and

(C) has expertise in Native Hawaiian Affairs, and

shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.

(12) **"Office of Hawaiian Affairs"** means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.

(13) **"right of possession"** means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 7(c) of this Act [25 U.S.C. 3005(c)], result in a Fifth Amendment taking by the United States as determined by the United States Court of Federal Claims pursuant to

28 U.S.C. 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

(14) **"Secretary"** means the Secretary of the Interior.

(15) **"tribal land"** means—

(A) all lands within the exterior boundaries of any Indian reservation;

(B) all dependent Indian communities;

(C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920 [42 Stat. 108], and section 4 of Public Law 86-3 [note preceding 48 U.S.C. 491].

25 U.S.C. 3002, Ownership

25 U.S.C. 3002(a), Native American human remains and objects

Section 3

(a) The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed)—

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe—

(1) [sic] in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) [sic] if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

25 U.S.C. 3002(b), Unclaimed Native American remains and objects

(b) Native American cultural items not claimed under subsection (a) of this section shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 8 of this Act [25 U.S.C. 3006], Native American groups, representatives of museums and the scientific community.

25 U.S.C. 3002(c), Intentional excavation and removal of Native American human remains and objects

(c) The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if—

(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979, as amended, [16 U.S.C. 470cc] which shall be consistent with this Act;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) of this section; and

(4) proof of consultation or consent under paragraph (2) is shown.

25 U.S.C. 3002(d), Inadvertent discovery of Native American remains and objects

(d)(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990, shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. 1601 et seq.], the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

25 U.S.C. 3002(e), Relinquishment

(e) Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

18 U.S.C. 1170, Illegal trafficking in Native American human remains and cultural items

Section 4

(a) Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new section:

Section 1170

"(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both."

"(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both."

(b) The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"1170, Illegal Trafficking in Native American Human Remains and Cultural Items."

25 U.S.C. 3003, Inventory for human remains and associated funerary objects

Section 5

(a) Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.

25 U.S.C. 3003(a), In general

25 U.S.C. 3003(b), Requirements

(b)(1) The inventories and identifications required under subsection (a) of this section shall be—

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after November 16, 1990, [the date of enactment of this Act], and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 8 of this Act [25 U.S.C. 3006].

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term "**documentation**" means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

25 U.S.C. 3003(c), Extension of time for inventory

(c) Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B) of this section. The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

25 U.S.C. 3003(d), Notification

(d)(1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

(2) The notice required by paragraph (1) shall include information—

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

25 U.S.C. 3003(e), Definition of inventory

(e) For the purposes of this section, the term "**inventory**" means a simple itemized list that summarizes the information called for by this section.

Section 6

25 U.S.C. 3004, Summary for unassociated funerary objects, sacred objects, and cultural patrimony

25 U.S.C. 3004(a), In general

(a) Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.

25 U.S.C. 3004(b), Requirements for the summary

(b)(1) The summary required under subsection (a) of this section shall be—

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

(C) completed by not later than the date that is 3 years after November 16, 1990, [the date of enactment of this Act].

(2) Upon request, Indian Tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

25 U.S.C. 3005, Repatriation

25 U.S.C. 3005(a), Repatriation of Native American human remains and objects possessed or controlled by Federal agencies and museums

Section 7

(a)(1) If, pursuant to section 5 of this Act [25 U.S.C. 3003], the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 6 of this Act [25 U.S.C. 3004], the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5 of this Act [25 U.S.C. 3003], or the summary pursuant to section 6 of this Act [25 U.S.C. 3004], or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) of this section and, in the case of unassociated funerary objects, subsection (c) of this section, such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e) of this section, sacred objects and objects of cultural patrimony shall be expeditiously returned where—

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendents, upon notice, have failed to make a claim for the object under this Act.

25 U.S.C. 3005(b), Scientific study

(b) If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

25 U.S.C. 3005(c), Standard for repatriation

(c) If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

25 U.S.C. 3005(d), Sharing of information by Federal agencies and museums

(d) Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

25 U.S.C. 3005(e), Competing claims

(e) Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

25 U.S.C. 3005(f), Museum obligation

(f) Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

25 U.S.C. 3006, Review committee

Section 8

25 U.S.C. 3006(a), Establishment

(a) Within 120 days after November 16, 1990, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 5, 6 and 7 of this Act [25 U.S.C. 3003, 3004, and 3005].

25 U.S.C. 3006(b), Committee membership

(b)(1) The Committee established under subsection (a) of this section shall be composed of 7 members,

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;

(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and

(C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

(2) The Secretary may not appoint Federal officers or employees to the committee.

(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) of this section shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5 [United States Code].

25 U.S.C. 3006(c), Committee responsibilities

(c) The committee established under subsection a) of this section shall be responsible for—

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 5 and 6 of this Act [25 U.S.C. 3003 and 3004] to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon the request of any affected party, reviewing and making findings related to—

(A) the identity or cultural affiliation of cultural items, or

(B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;

(6) consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;

(7) consulting with the Secretary in the development of regulations to carry out this Act;

(8) performing such other related functions as the Secretary may assign to the committee; and

(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.

25 U.S.C. 3006(d), Admissibility of records

(d) Any records and findings made by the review committee pursuant to this Act relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under section 15 of this Act [25 U.S.C. 3013].

25 U.S.C. 3006(e), Recommendations and report

(e) The committee shall make the recommendations under paragraph (c)(5) of this section in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

25 U.S.C. 3006(f), Committee access

(f) The Secretary shall ensure that the committee established under subsection (a) of this section and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.

25 U.S.C. 3006(g), Duties of the Secretary, regulations, and administrative support

(g) The Secretary shall—

(1) establish such rules and regulations for the committee as may be necessary, and

(2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

25 U.S.C. 3006(h), Annual report to Congress

(h) The committee established under subsection (a) of this section shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

25 U.S.C. 3006(i), Committee termination

(i) The committee established under subsection (a) of this section shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

Section 9

25 U.S.C. 3007, Penalty assessment, museums

25 U.S.C. 3007(a), Penalty

(a) Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.

25 U.S.C. 3007(b), Amount of penalty

(b) The amount of a penalty assessed under subsection (a) of this section shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors—

(1) the archaeological, historical, or commercial value of the item involved;

(2) the damages suffered, both economic and noneconomic, by an aggrieved party, and

(3) the number of violations that have occurred.

25 U.S.C. 3007(c), Legal actions to recover penalties

(c) If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been issued under subsection (a) of this section and not appealed or after a final judgment has been rendered on appeal of such order, the Attorney General may institute a civil action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.

25 U.S.C. 3007(d), Authority to issue subpoenas

(d) In hearings held pursuant to subsection (a) of this section, subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

25 U.S.C. 3008, Grants

Section 10

25 U.S.C. 3008(a), Grants to Indian tribes and Native Hawaiian organizations

(a) The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.

25 U.S.C. 3008(b), Grants to museums

(b) The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6 of this Act [25 U.S.C. 3003 and 3004].

25 U.S.C. 3009, Limitations on applying the Act

Section 11

Nothing in this Act shall be construed to—

(1) limit the authority of any Federal agency or museum to—

(A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and

(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;

(2) delay actions on repatriation requests that are pending on November 16, 1990;

(3) deny or otherwise affect access to any court;

(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or

(5) limit the application of any State or Federal law pertaining to theft or stolen property.

25 U.S.C. 3010, Special relationship between the Federal Government and Indian tribes and Native Hawaiian organizations

Section 12

This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

25 U.S.C. 3011, Regulations

Section 13

The Secretary shall promulgate regulations to carry out this Act within 12 months of November 16, 1990.

25 U.S.C. 3012, Authorization of appropriations

Section 14

There is authorized to be appropriated such sums as may be necessary to carry out this Act.

25 U.S.C. 3013, Judicial jurisdiction and enforcement

Section 15

The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

National Historic Preservation Act of 1966,
As amended through 2006
[With annotations]

[This Act became law on October 15, 1966 (Public Law 89-665; 16 U.S.C. 470 et seq.). Subsequent amendments to the Act include Public Law 91-243, Public Law 93-54, Public Law 94-422, Public Law 94-458, Public Law 96-199, Public Law 96-244, Public Law 96-515, Public Law 98-483, Public Law 99-514, Public Law 100-127, Public Law 102-575, Public Law 103-437, Public Law 104-333, Public Law 106-113, Public Law 106-176, Public Law 106-208, Public Law 106-355, and Public Law 109-453. This description of the Act, as amended, tracts the language of the United States Code except that (in following common usage) we refer to the "Act"(meaning the Act, as amended) rather than to the "subchapter" or the "title" of the Code. This description also excludes some of the notes found in the Code as well as those sections of the amendments dealing with completed reports. Until the Code is updated through the end of the 106th Congress, the Code citations for Sections 308 and 309 are speculative.]

AN ACT to Establish a Program for the Preservation of Additional Historic Properties throughout the Nation, and for Other Purposes.

Section 1

[16 U.S.C. 470 — Short title of the Act]

(a) This Act may be cited as the "National Historic Preservation Act".

[Purpose of the Act]

(b) The Congress finds and declares that —

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;

(2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;

(5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;

(6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and

(7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is

nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

Section 2

[16 U.S.C. 470-1 — Declaration of policy of the Federal Government]

It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and individuals to —

(1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

(2) provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations and in the administration of the national preservation program in partnership with States, Indian tribes, Native Hawaiians, and local governments;

(3) administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations;

(4) contribute to the preservation of nonfederally owned prehistoric and historic resources and give maximum encouragement to organizations and individuals undertaking preservation by private means;

(5) encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and

(6) assist State and local governments, Indian tribes and Native Hawaiian organizations and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

TITLE I

Section 101

[16 U.S.C. 470a(a) — National Register of Historic Places, expansion and maintenance]

(a) (1) (A) The Secretary of the Interior is authorized to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture. Notwithstanding section 1125(c) of Title 15 [of the U.S. Code], buildings and structures on or eligible for inclusion on the National Register of Historic Places (either individually or as part of a historic district), or designated as an individual landmark or as a contributing building in a historic district by a unit of State or local government, may retain the name historically associated with the building or structure.

[National Historic Landmarks, designation]

(B) Properties meeting the criteria for National Historic Landmarks established pursuant to paragraph (2) shall be designated as "National Historic Landmarks" and included on the National Register, subject to the requirements of paragraph (6). All historic properties included on the National Register on December 12, 1980 [the date of enactment of the National Historic Preservation Act Amendments of 1980], shall be deemed to be included on the National Register as of their initial listing for purposes of this Act. All historic properties listed in the Federal Register of February 6, 1979, as "National Historic Landmarks" or thereafter prior to the effective date of this Act are declared by Congress to be National historic Landmarks of national historic significance as of their initial listing as such in the Federal Register for purposes of this Act and the Act of August 21, 1935 (49 Stat.666) [16 U.S.C. 461 to 467]; except that in cases of National Historic Landmark districts for which no boundaries have been established, boundaries must first be published in the Federal Register.

[Criteria for National Register and National Historic Landmarks and regulations]

(2) The Secretary in consultation with national historic and archaeological associations, shall establish or revise criteria for properties to be included on the National Register and criteria for National Historic Landmarks, and shall also promulgate or revise regulations as may be necessary for —

(A) nominating properties for inclusion in, and removal from, the National Register and the recommendation of properties by certified local governments;

(B) designating properties as National Historic Landmarks and removing such designation;

(C) considering appeals from such recommendations, nomination, removals, and designations (or any failure or refusal by a nominating authority to nominate or designate);

(D) nominating historic properties for inclusion in the World Heritage List in accordance with the terms of the Convention concerning the Protection of the World Cultural and Natural Heritage;

(E) making determinations of eligibility of properties for inclusion on the National Register; and

(F) notifying the owner of a property, any appropriate local governments, and the general public, when the property is being considered for inclusion on the National Register, for designation as a National Historic Landmark or for nomination to the World Heritage List.

[Nominations to the National Register]

(3) Subject to the requirements of paragraph (6), any State which is carrying out a program approved under subsection (b) of this section, shall nominate to the Secretary properties which meet the criteria promulgated under subsection (a) of this section for inclusion on the National Register. Subject to paragraph (6), any property nominated under this paragraph or under section 110 (a)(2) of this Act shall be included on the National Register on the date forty-five days after receipt by the Secretary of the nomination and the necessary documentation, unless

the Secretary disapproves such nomination within such forty-five day period or unless an appeal is filed under paragraph (5).

[Nominations from individuals and local governments]

(4) Subject to the requirements of paragraph (6) the Secretary may accept a nomination directly from any person or local government for inclusion of a property on the National Register only if such property is located in a State where there is no program approved under subsection (b) of this section. The Secretary may include on the National Register any property for which such a nomination is made if he determines that such property is eligible in accordance with the regulations promulgated under paragraph (2). Such determinations shall be made within ninety days from the date of nomination unless the nomination is appealed under paragraph (5).

[Appeals of nominations]

(5) Any person or local government may appeal to the Secretary a nomination of any historic property for inclusion on the National Register and may appeal to the Secretary the failure or refusal of a nominating authority to nominate a property in accordance with this subsection.

[Owner participation in nomination process]

(6) The Secretary shall promulgate regulations requiring that before any property or district may be included on the National Register or designated as a National Historic Landmark, the owner or owners of such property, or a majority of the owners of the properties within the district in the case of an historic district, shall be given the opportunity (including a reasonable period of time) to concur in, or object to, the nomination of the property or district for such inclusion or designation. If the owner or owners of any privately owned property, or a majority of the owners of such properties within the district in the case of an historic district, object to such inclusion or designation, such property shall not be included on the National Register or designated as a National Historic Landmark until such objection is withdrawn. The Secretary shall review the nomination of the property or district where any such objection has been made and shall determine whether or not the property or district is eligible for such inclusion or designation, and if the Secretary determines that such property or district is eligible for such inclusion or designation, he shall inform the Advisory Council on Historic Preservation, the appropriate State Historic Preservation Officer, the appropriate chief elected local official and the owner or owners of such property, of his determination. The regulations under this paragraph shall include provisions to carry out the purposes of this paragraph in the case of multiple ownership of a single property.

[Regulations for curation, documentation, and local government certification]

(7) The Secretary shall promulgate, or revise, regulations —

(A) ensuring that significant prehistoric and historic artifacts, and associated records, subject to section 110 of this Act [16 U.S.C. 470h-2], the Act of June 27, 1960 (16 U.S.C. 469c), and the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa and following) are deposited in an institution with adequate long-term curatorial capabilities;

(B) establishing a uniform process and standards for documenting historic properties by public agencies and private parties for purposes of incorporation into, or

complementing, the national historic architectural and engineering records within the Library of Congress; and

(C) certifying local governments, in accordance with subsection (c)(1) of this section and for the allocation of funds pursuant to section 103 (c) of this Act [16 U.S.C. 470c(c)].

[Review threats to eligible and listed properties and recommend action]

(8) The Secretary shall, at least once every 4 years, in consultation with the Council and with State Historic Preservation Officers, review significant threats to properties included in, or eligible for inclusion on, the National Register, in order to —

(A) determine the kinds of properties that may be threatened;

(B) ascertain the causes of the threats; and

(C) develop and submit to the President and Congress recommendations for appropriate action.

[16 U.S.C. 470a(b) — State Historic Preservation Programs]

(b) (1) The Secretary, in consultation with the National Conference of State Historic Preservation Officers and the National Trust for Historic Preservation, shall promulgate or revise regulations for State Historic Preservation Programs. Such regulations shall provide that a State program submitted to the Secretary under this section shall be approved by the Secretary if he determines that the program —

[Designation of the State Historic Preservation Officer (SHPO)]

(A) provides for the designation and appointment by the Governor of a "State Historic Preservation Officer" to administer such program in accordance with paragraph (3) and for the employment or appointment by such officer of such professionally qualified staff as may be necessary for such purposes;

[Designation of the State Review Board]

(B) provides for an adequate and qualified State historic preservation review board designated by the State Historic Preservation Officer unless otherwise provided for by State law; and

(C) provides for adequate public participation in the State Historic Preservation Program, including the process of recommending properties for nomination to the National Register.

[Review of State programs]

(2) (A) Periodically, but not less than every 4 years after the approval of any State program under this subsection, the Secretary, in consultation with the Council on the appropriate provisions of this Act, and in cooperation with the State Historic Preservation Officer, shall evaluate the program to determine whether it is consistent with this Act.

(B) If, at any time, the Secretary determines that a major aspect of a State program is not consistent with this Act, the Secretary shall disapprove the program and suspend in whole or in part any contracts or cooperative agreements with the State and the State Historic Preservation Officer under this Act, until the program is consistent with this Act, unless the Secretary determines that the program will be made consistent with this Act within a reasonable period of time.

(C) The Secretary, in consultation with State Historic Preservation Officers, shall establish oversight methods to ensure State program consistency and quality without imposing undue review burdens on State Historic Preservation Officers.

(D) At the discretion of the Secretary, a State system of fiscal audit and management may be substituted for comparable Federal systems so long as the State system —

(i) establishes and maintains substantially similar accountability standards; and

(ii) provides for independent professional peer review.

The Secretary may also conduct periodic fiscal audits of State programs approved under this section as needed and shall ensure that such programs meet applicable accountability standards.

[SHPO responsibilities]

(3) It shall be the responsibility of the State Historic Preservation Officer to administer the State Historic Preservation Program and to —

(A) in cooperation with Federal and State agencies, local governments, and private organizations and individuals, direct and conduct a comprehensive statewide survey of historic properties and maintain inventories of such properties;

(B) identify and nominate eligible properties to the National Register and otherwise administer applications for listing historic properties on the National Register;

(C) prepare and implement a comprehensive statewide historic preservation plan;

(D) administer the State program of Federal assistance for historic preservation within the State;

(E) advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;

(F) cooperate with the Secretary, the Advisory Council on Historic Preservation, and other Federal and State agencies, local governments, and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development;

(G) provide public information, education, and training, and technical assistance in historic preservation;

(H) cooperate with local governments in the development of local historic preservation programs and assist local governments in becoming certified pursuant to subsection (c) of this section;

(I) consult with the appropriate Federal agencies in accordance with this Act on —

(i) Federal undertakings that may affect historic properties; and

(ii) the content and sufficiency of any plans developed to protect, manage, or to reduce or mitigate harm to such properties; and

(J) advise and assist in the evaluation of proposals for rehabilitation projects that may qualify for Federal assistance.

[Arrangements with nonprofit organizations]

(4) Any State may carry out all or any part of its responsibilities under this subsection by contract or cooperative agreement with any qualified nonprofit organization or educational institution.

[Approval of existing programs]

(5) Any State historic preservation program in effect under prior authority of law may be treated as an approved program for purposes of this subsection until the earlier of —

(A) the date on which the Secretary approves a program submitted by the State under this subsection, or

(B) three years after October 30, 1992 [the date of the enactment of the National Historic Preservation Act Amendments of 1992].

[Contracts or cooperative agreements with State Historic Preservation Officers]

(6) (A) Subject to subparagraphs (C) and (D), the Secretary may enter into contracts or cooperative agreements with a State Historic Preservation Officer for any State authorizing such Officer to assist the Secretary in carrying out one or more of the following responsibilities within that State —

(i) Identification and preservation of historic properties.

(ii) Determination of the eligibility of properties for listing on the National Register.

(iii) Preparation of nominations for inclusion on the National Register.

(iv) Maintenance of historical and archaeological data bases.

(v) Evaluation of eligibility for Federal preservation incentives.

Nothing in this paragraph shall be construed to provide that any State Historic Preservation Officer or any other person other than the Secretary shall have the authority to maintain the National Register for properties in any State.

(B) The Secretary may enter into a contract or cooperative agreement under subparagraph (A) only if —

(i) the State Historic Preservation Officer has requested the additional responsibility;

(ii) the Secretary has approved the State historic preservation program pursuant to subsection (b)(1) and (2) of this section;

(iii) the State Historic Preservation Officer agrees to carry out the additional responsibility in a timely and efficient manner acceptable to the Secretary and the Secretary determines that such Officer is fully capable of carrying out such responsibility in such manner;

(iv) the State Historic Preservation Officer agrees to permit the Secretary to review and revise, as appropriate in the discretion of the Secretary, decisions made by the Officer pursuant to such contract or cooperative agreement; and

(v) the Secretary and the State Historic Preservation Officer agree on the terms of additional financial assistance to the State, if there is to be any, for the costs of carrying out such responsibility.

(C) For each significant program area under the Secretary's authority, the Secretary shall establish specific conditions and criteria essential for the assumption by State Historic Preservation Officers of the Secretary's duties in each such program.

(D) Nothing in this subsection shall have the effect of diminishing the preservation programs and activities of the National Park Service.

[16 U.S.C. 470a(c) — Certification of local governments]

(c) (1) Any State program approved under this section shall provide a mechanism for the certification by the State Historic Preservation Officer of local governments to carry out the purposes of this Act and provide for the transfer, in accordance with section 103(c) of this Act [16 U.S.C. 470c(c)], of a portion of the grants received by the States under this Act, to such local governments. Any local government shall be certified to participate under the provisions of this section if the applicable State Historic Preservation Officer, and the Secretary, certifies that the local government —

(A) enforces appropriate State or local legislation for the designation and protection of historic properties;

(B) has established an adequate and qualified historic preservation review commission by State or local legislation;

(C) maintains a system for the survey and inventory of historic properties that furthers the purposes of subsection (b) of this section;

(D) provides for adequate public participation in the local historic preservation program, including the process of recommending properties for nomination to the National Register; and

(E) satisfactorily performs the responsibilities delegated to it under this Act.

Where there is no approved State program, a local government may be certified by the Secretary if he determines that such local government meets the requirements of subparagraphs (A) through (E); and in any such case the Secretary may make grants-in-aid to the local government for purposes of this section.

[Participation of certified local governments in National Register nominations]

(2) (A) Before a property within the jurisdiction of the certified local government may be considered by the State to be nominated to the Secretary for inclusion on the National Register, the State Historic Preservation Officer shall notify the owner, the applicable chief local elected official, and the local historic preservation commission. The commission, after reasonable opportunity for public comment, shall prepare a report as to whether or not such property, in its opinion, meets the criteria of the National Register. Within sixty days of notice from the State Historic Preservation Officer, the chief local elected official shall transmit the report of the commission and his recommendation to the state Historic Preservation Officer. Except as provided in subparagraph (B), after receipt of such report and recommendation, or if no such report and recommendation are received within sixty days, the State shall make the nomination pursuant to subsection (a) of this subsection. The State may expedite such process with the concurrence of the certified local government.

(B) If both the commission and the chief local elected official recommend that a property not be nominated to the National Register, the State Historic Preservation Officer shall take no further action, unless within thirty days of the receipt of such recommendation by the State Historic Preservation Officer an appeal is filed with the State. If such an appeal is filed, the State shall follow the procedures for making a nomination pursuant to subsection (a) of this section. Any report and recommendations made under this section shall be included with any nomination submitted by the State to the Secretary.

(3) Any local government certified under this section or which is making efforts to become so certified shall be eligible for funds under the provision of section 103 (c) of this Act [16 U.S.C. 470c(c)], and shall carry out any responsibilities delegated to it in accordance with such terms and conditions as the Secretary deems necessary or advisable.

[Definitions]

(4) For the purposes of this section the term —

(A) **"designation"** means the identification and registration of properties for protection that meet criteria established by the State or the locality for significant historic and prehistoric resources within the jurisdiction of a local government; and

(B) **"protection"** means a local review process under State or local law for proposed demolition of, changes to, or other action that may affect historic properties designated pursuant to this subsection.

[16 U.S.C. 470a(d) — Establish program and regulations to assist Indian tribes]

(d) (1) (A) The Secretary shall establish a program and promulgate regulations to assist Indian tribes in preserving their particular historic properties. The Secretary shall foster

communication and cooperation between Indian tribes and State Historic Preservation Officers in the administration of the national historic preservation program to ensure that all types of historic properties and all public interests in such properties are given due consideration, and to encourage coordination among Indian tribes, State Historic Preservation Officers, and Federal agencies in historic preservation planning and in the identification, evaluation, protection, and interpretation of historic properties.

(B) The program under subparagraph (A) shall be developed in such a manner as to ensure that tribal values are taken into account to the extent feasible. The Secretary may waive or modify requirements of this section to conform to the cultural setting of tribal heritage preservation goals and objectives. The tribal programs implemented by specific tribal organizations may vary in scope, as determined by each tribe's chief governing authority.

(C) The Secretary shall consult with Indian tribes, other Federal agencies, State Historic Preservation Officers, and other interested parties and initiate the program under subparagraph (A) by not later than October 1, 1994.

[Indian Tribes may assume State Historic Preservation Officer functions]

(2) A tribe may assume all or any part of the functions of a State Historic Preservation Officer in accordance with subsections (b)(2) and (b)(3) of this section, with respect to tribal lands, as such responsibilities may be modified for tribal programs through regulations issued by the Secretary if —

(A) the tribe's chief governing authority so requests;

(B) the tribe designates a tribal preservation official to administer the tribal historic preservation program, through appointment by the tribe's chief governing authority or as a tribal ordinance may otherwise provide;

(C) the tribal preservation official provides the Secretary with a plan describing how the functions the tribal preservation official proposes to assume will be carried out;

(D) the Secretary determines, after consultation with the tribe, the appropriate State Historic Preservation Officer, the Council (if the tribe proposes to assume the functions of the State Historic Preservation Officer with respect to review of undertakings under section 106 of this Act), and other tribes, if any, whose tribal or aboriginal lands may be affected by conduct of the tribal preservation program —

(i) that the tribal preservation program is fully capable of carrying out the functions specified in the plan provided under subparagraph (C);

(ii) that the plan defines the remaining responsibilities of the Secretary and the State Historic Preservation Officer; and

(iii) that the plan provides, with respect to properties neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe, at the request of the owner thereof, the State Historic Preservation Officer, in addition to the tribal preservation official, may exercise the historic preservation responsibilities in accordance with subsections (b)(2) and (b)(3) of this section; and

(E) based on satisfaction of the conditions stated in subparagraphs (A), (B), (C), and (D), the Secretary approves the plan.

(3) In consultation with interested Indian tribes, other Native American organizations and affected State Historic Preservation Officers, the Secretary shall establish and implement procedures for carrying out section 103(a) of this Act with respect to tribal programs that assume responsibilities under paragraph (2).

(4) At the request of a tribe whose preservation program has been approved to assume functions and responsibilities pursuant to paragraph (2), the Secretary shall enter into contracts or cooperative agreements with such tribe permitting the assumption by the tribe of any part of the responsibilities referred to in subsection (b)(6) of this section on tribal land, if —

(A) the Secretary and the tribe agree on additional financial assistance, if any, to the tribe for the costs of carrying out such authorities;

(B) the Secretary finds that the tribal historic preservation program has been demonstrated to be sufficient to carry out the contract or cooperative agreement and this Act; and

(C) the contract or cooperative agreement specifies the continuing responsibilities of the Secretary or of the appropriate State Historic Preservation Officers and provides for appropriate participation by —

(i) the tribe's traditional cultural authorities;

(ii) representatives of other tribes whose traditional lands are under the jurisdiction of the tribe assuming responsibilities; and

(iii) the interested public.

(5) The Council may enter into an agreement with an Indian tribe to permit undertakings on tribal land to be reviewed under tribal historic preservation regulations in place of review under regulations promulgated by the Council to govern compliance with section 106 of this Act, if the Council, after consultation with the tribe and appropriate State Historic Preservation Officers, determines that the tribal preservation regulations will afford historic properties consideration equivalent to those afforded by the Council's regulations.

[Traditional religious and cultural properties may be eligible for listing in the National Register]

(6) (A) Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.

(B) In carrying out its responsibilities under section 106 of this Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A).

(C) In carrying out his or her responsibilities under subsection (b)(3) of this section, the State Historic Preservation Officer for the State of Hawaii shall —

(i) consult with Native Hawaiian organizations in assessing the cultural

significance of any property in determining whether to nominate such property to the National Register;

(ii) consult with Native Hawaiian organizations in developing the cultural component of a preservation program or plan for such property; and

(iii) enter into a memorandum of understanding or agreement with Native Hawaiian organizations for the assessment of the cultural significance of a property in determining whether to nominate such property to the National Register and to carry out the cultural component of such preservation program or plan.

[16 U.S.C. 470a(e) — Grants to States]

(e) (1) The Secretary shall administer a program of matching grants to the States for the purposes of carrying out this Act.

[Grants to the National Trust]

(2) The Secretary may administer grants to the National Trust for Historic Preservation in the United States, chartered by Act of Congress approved October 26, 1949 (63 Stat. 927) [16 U.S.C. 468], consistent with the purposes of its charter and this Act.

[Direct grants for threatened National Historic Landmarks, demonstration projects, training, and displacement prevention]

(3) (A) In addition to the programs under paragraphs (1) and (2), the Secretary shall administer a program of direct grants for the preservation of properties included on the National Register. Funds to support such program annually shall not exceed 10 per centum of the amount appropriated annually for the fund established under section 108 of this Act. These grants may be made by the Secretary, in consultation with the appropriate State Historic Preservation Officer —

(i) for the preservation of National Historic Landmarks which are threatened with demolition or impairment and for the preservation of historic properties of World Heritage significance,

(ii) for demonstration projects which will provide information concerning professional methods and techniques having application to historic properties,

(iii) for the training and development of skilled labor in trades and crafts, and in analysis and curation, relating to historic preservation, and

(iv) to assist persons or small businesses within any historic district included in the National Register to remain within the district.

[Grants or loans to Indian tribes and non-profit ethnic or minority organizations for preserving cultural heritage]

(B) The Secretary may also, in consultation with the appropriate State Historic Preservation Officer, make grants or loans or both under this section to Indian tribes

and to nonprofit organizations representing ethnic or minority groups for the preservation of their cultural heritage.

(C) Grants may be made under subparagraph (A)(i) and (iv) only to the extent that the project cannot be carried out in as effective a manner through the use of an insured loan under section 104 of this Act.

[Grants for religious properties]

(4) Grants may be made under this subsection for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant. Nothing in this paragraph shall be construed to authorize the use of any funds made available under this section for the acquisition of any property referred to in the preceding sentence.

[Direct grants to Indian tribes and Native Hawaiian organizations]

(5) The Secretary shall administer a program of direct grants to Indian tribes and Native Hawaiian organizations for the purpose of carrying out this Act as it pertains to Indian tribes and Native Hawaiian organizations. Matching fund requirements may be modified. Federal funds available to a tribe or Native Hawaiian organization may be used as matching funds for the purposes of the tribe's or organization's conducting its responsibilities pursuant to this section.

[Direct grants to Micronesia, Marshall Islands, and Palau]

(6) (A) As a part of the program of matching grant assistance from the Historic Preservation Fund to States, the Secretary shall administer a program of direct grants to the Federated States of Micronesia, the Republic of the Marshall Islands, the Trust Territory of the Pacific Islands, and upon termination of the Trusteeship Agreement for the Trust Territory of the Pacific Islands, the Republic of Palau (referred to as the Micronesian States) in furtherance of the Compact of Free Association between the United States and the Federated States of Micronesia and the Marshall Islands, approved by the Compact of Free Association Act of 1985 (48 U.S.C. 1681 note), the Trusteeship Agreement for the Trust Territory of the Pacific Islands, and the Compact of Free Association between the United States and Palau, approved by the Joint Resolution entitled "Joint Resolution to approve the 'Compact of Free Association' between the United States and Government of Palau, and for other purposes" (48 U.S.C. 1681 note). The goal of the program shall be to establish historic and cultural preservation programs that meet the unique needs of each Micronesian State so that at the termination of the compacts the programs shall be firmly established. The Secretary may waive or modify the requirements of this section to conform to the cultural setting of those nations.

(B) The amounts to be made available to the Micronesian States shall be allocated by the Secretary on the basis of needs as determined by the Secretary. Matching funds may be waived or modified.

[16 U.S.C. 470a(f) — Prohibition on compensating intervenors]

(f) No part of any grant made under this section may be used to compensate any person intervening in any proceeding under this Act.

[16 U.S.C. 470a(g) — Guidelines for Federal agency responsibilities]

(g) In consultation with the Advisory Council on Historic Preservation, the Secretary shall promulgate guidelines for Federal agency responsibilities under section 110 of this Act.

[16 U.S.C. 470a(h) — Preservation standards for federally owned properties]

(h) Within one year after December 12, 1980 [the date of enactment of the National Historic Preservation Act Amendments of 1980], the Secretary shall establish, in consultation with the Secretaries of Agriculture and Defense, the Smithsonian Institution, and the Administrator of the General Services Administration, professional standards for the preservation of historic properties in Federal ownership or control.

[16 U.S.C. 470a(i) — Technical advice]

(i) The Secretary shall develop and make available to Federal agencies, State and local governments, private organizations and individuals, and other nations and international organizations pursuant to the World Heritage Convention, training in, and information concerning, professional methods and techniques for the preservation of historic properties and for the administration of the historic preservation program at the Federal, State, and local level. The Secretary shall also develop mechanisms to provide information concerning historic preservation to the general public including students.

[16 U.S.C. 470a(j) — Develop and implement a comprehensive preservation education and training program]

(j) (1) The Secretary shall, in consultation with the Council and other appropriate Federal, tribal, Native Hawaiian, and non-Federal organizations, develop and implement a comprehensive preservation education and training program.

(2) The education and training program described in paragraph (1) shall include —

(A) new standards and increased preservation training opportunities for Federal workers involved in preservation-related functions;

(B) increased preservation training opportunities for other Federal, State, tribal and local government workers, and students;

(C) technical or financial assistance, or both, to historically black colleges and universities, to tribal colleges, and to colleges with a high enrollment of Native Americans or Native Hawaiians, to establish preservation training and degree programs; and

(D) coordination of the following activities, where appropriate, with the National Center for Preservation Technology and Training —

(i) distribution of information on preservation technologies;

(ii) provision of training and skill development in trades, crafts, and disciplines related to historic preservation in Federal training and development programs; and

(iii) support for research, analysis, conservation, curation, interpretation, and display related to preservation.

Section 102

[16 U.S.C. 470b(a) — Grant requirements]

(a) No grant may be made under this Act —

(1) unless application therefore is submitted to the Secretary in accordance with regulations and procedures prescribed by him;

(2) unless the application is in accordance with the comprehensive statewide historic preservation plan which has been approved by the Secretary after considering its relationship to the comprehensive statewide outdoor recreation plan prepared pursuant to the Land and Water Conservation Fund Act of 1965 (78 Stat. 897) [16 U.S.C. 460l-4];

(3) for more than 60 percent of the aggregate costs of carrying out projects and programs under the administrative control of the State Historic Preservation Officer as specified in section 101(b)(3) of this Act in any one fiscal year;

(4) unless the grantee has agreed to make such reports, in such form and containing such information as the Secretary may from time to time require;

(5) unless the grantee has agreed to assume, after completion of the project, the total cost of the continued maintenance, repair, and administration of the property in a manner satisfactory to the Secretary; and

(6) until the grantee has complied with such further terms and conditions as the Secretary may deem necessary or advisable.

Except as permitted by other law, the State share of the costs referred to in paragraph (3) shall be contributed by non-Federal sources. Notwithstanding any other provision of law, no grant made pursuant to this Act shall be treated as taxable income for purposes of the Internal Revenue Code of 1986 [Title 26 of the U.S. Code].

[16 U.S.C. 470b(b) — Waiver for the National Trust]

(b) The Secretary may in his discretion waive the requirements of subsection (a), paragraphs (2) and (5) of this section for any grant under this Act to the National Trust for Historic Preservation in the United States.

[16 U.S.C. 470b(c) — State limitation on matching]*
*[*Technically, subsection (c) was repealed and replaced by two subsection "d"s]*

(c*) No State shall be permitted to utilize the value of real property obtained before October 15, 1966 [the date of approval of this Act], in meeting the remaining cost of a project for which a grant is made under this Act.

[16 U.S.C. 470b(d) — Availability of funds]

(d) The Secretary shall make funding available to individual States and the National Trust for Historic Preservation as soon as practicable after execution of a grant agreement. For purposes of administration, grants to individual States and the National Trust each shall be considered to be one grant and shall be administered by the National Park Service as such.

[16 U.S.C. 470b(e) — Administrative Costs]

(e) The total administrative costs, direct and indirect, charged for carrying out State projects and programs may not exceed 25 percent of the aggregate costs except in the case of grants under section 101(e)(6) of this Act.

Section 103

[16 U.S.C. 470c(a) — Basis for apportionment of grants]

(a) The amounts appropriated and made available for grants to the States for the purposes of this Act shall be apportioned among the States by the Secretary on the basis of needs as determined by him.

[16 U.S.C. 470c(b) — Apportionment basis, notice, reapportionment, etc.]

(b) The amounts appropriated and made available for grants to the States for projects and programs under this Act for each fiscal year shall be apportioned among the States as the Secretary determines to be appropriate.

The Secretary shall notify each State of its apportionment under this subsection within thirty days following the date of enactment of legislation appropriating funds under this Act. Any amount of any apportionment that has not been paid or obligated by the Secretary during the fiscal year in which such notification is given and for two fiscal years thereafter, shall be reapportioned by the Secretary in accordance with this subsection. The Secretary shall analyze and revise as necessary the method of apportionment. Such method and any revision thereof shall be published by the Secretary in the Federal Register.

[16 U.S.C. 470c(c) — Requirements for certified local government pass-through subgrants]

(c) A minimum of 10 per centum of the annual apportionment distributed by the Secretary to each State for the purposes of carrying out this Act shall be transferred by the State, pursuant to the requirements of this Act, to local governments which are certified under section 101(c) of this Act for historic preservation projects or programs of such local governments. In any year in which the total annual apportionment to the States exceeds $65,000,000, one half of the excess shall also be transferred by the States to local governments certified pursuant to section 101(c) of this Act.

[16 U.S.C. 470c(d) — Guidelines for State distribution to certified local governments]

(d) The Secretary shall establish guidelines for the use and distribution of funds under subsection (c) of this section to insure that no local government receives a disproportionate share of the funds available, and may include a maximum or minimum limitation on the amount of funds distributed to any single local government. The guidelines shall not limit the ability of any State to distribute more than 10 per centum of its annual apportionment under subsection (c) of this section, nor shall the Secretary require any State to exceed the 10 per centum minimum distribution to local governments.

Section 104

[16 U.S.C. 470d(a) — Insured loans for National Register]

(a) The Secretary shall establish and maintain a program by which he may, upon application of a private lender, insure loans (including loans made in accordance with a mortgage) made by such lender to finance any project for the preservation of a property included on the National Register.

[16 U.S.C. 470d(b) — Requirements]

(b) A loan may be insured under this section only if —

(1) the loan is made by a private lender approved by the Secretary as financially sound and able to service the loan properly;

(2) the amount of the loan, and interest rate charged with respect to the loan, do not exceed such amount, and such a rate, as is established by the Secretary, by rule;

(3) the Secretary has consulted the appropriate State Historic Preservation Officer concerning the preservation of the historic property;

(4) the Secretary has determined that the loan is adequately secured and there is reasonable assurance of repayment;

(5) the repayment period of the loan does not exceed the lesser of forty years or the expected life of the asset financed;

(6) the amount insured with respect to such loan does not exceed 90 per centum of the loss sustained by the lender with respect to the loan; and

(7) the loan, the borrower, and the historic property to be preserved meet other terms and conditions as may be prescribed by the Secretary, by rule, especially terms and conditions relating to the nature and quality of the preservation work.

[Interest rates]

The Secretary shall consult with the Secretary of the Treasury regarding the interest rate of loans insured under this section.

[16 U.S.C. 470d(c) — Limitation on loan authority]

(c) The aggregate unpaid principal balance of loans insured under this section and outstanding at any one time may not exceed the amount which has been covered into the Historic Preservation Fund pursuant to section 108 of this Act and subsections (g) and (i) of this section, as in effect on December 12, 1980 [the date of the enactment of the Act], but which has not been appropriated for any purpose.

[16 U.S.C. 470d(d) — Assignability and effect]

(d) Any contract of insurance executed by the Secretary under this section may be assignable, shall be an obligation supported by the full faith and credit of the United States, and shall be incontestable except for fraud or misrepresentation of which the holder had actual knowledge at the time it became a holder.

[16 U.S.C. 470d(e) — Method of payment for losses]

(e) The Secretary shall specify, by rule and in each contract entered into under this section, the conditions and method of payment to a private lender as a result of losses incurred by the lender on any loan insured under this section.

[16 U.S.C. 470d(f) — Protection of Government's financial interests; foreclosure]

(f) In entering into any contract to insure a loan under this section, the Secretary shall take steps to assure adequate protection of the financial interests of the Federal Government. The Secretary may —

(1) in connection with any foreclosure proceeding, obtain, on behalf of the Federal Government, the property securing a loan insured under this title; and

(2) operate or lease such property for such period as may be necessary to protect the interest of the Federal Government and to carry out subsection (g) of this section.

[16 U.S.C. 470d(g) — Conveyance of foreclosed property]

(g) (1) In any case in which a historic property is obtained pursuant to subsection (f) of this section, the Secretary shall attempt to convey such property to any governmental or nongovernmental entity under such conditions as will ensure the property's continued preservation and use; except that if, after a reasonable time, the Secretary, in consultation with the Advisory Council on Historic Preservation, determines that there is no feasible and prudent means to convey such property and to ensure its continued preservation and use, then the Secretary may convey the property at the fair market value of its interest in such property to any entity without restriction.

(2) Any funds obtained by the Secretary in connection with the conveyance of any property pursuant to paragraph (1) shall be covered into the historic preservation fund, in addition to the amounts covered into such fund pursuant to section 108 of this Act and subsection (i) of this section, and shall remain available in such fund until appropriated by the Congress to carry out the purposes of this Act.

[16 U.S.C. 470d(h) — Fees]

(h) The Secretary may assess appropriate and reasonable fees in connection with insuring loans under this section. Any such fees shall be covered into the Historic Preservation Fund, in addition to the amounts covered into such fund pursuant to section 108 of this Act and subsection (g) of this section, and shall remain available in such fund until appropriated by the Congress to carry out the purposes of this Act.

[16 U.S.C. 470d(i) — Loans to be considered non-Federal funds]

(i) Notwithstanding any other provision of law, any loan insured under this section shall be treated as non-Federal funds for the purposes of satisfying any requirement of any other provision of law under which Federal funds to be used for any project or activity are conditioned upon the use of non-Federal funds by the recipient for payment of any portion of the costs of such project or activity.

[16 U.S.C. 470d(j) — Appropriation authorization]

(j) Effective after the fiscal year 1981 there are authorized to be appropriated, such sums as may be necessary to cover payments incurred pursuant to subsection (e) of this section.

[16 U.S.C. 470d(k) — Prohibition against acquisition by Federal Financing Bank]

(k) No debt obligation which is made or committed to be made, or which is insured or committed to be insured, by the Secretary under this section shall be eligible for purchase by, or commitment to purchase by, or sale or issuance to, the Federal Financing Bank.

Section 105

[16 U.S.C. 470e — Recordkeeping]

The beneficiary of assistance under this Act shall keep such records as the Secretary shall prescribe, including records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

Section 106

[16 U.S.C. 470f — Advisory Council on Historic Preservation, comment on Federal undertakings]

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Section 107

[16 U.S.C. 470g — Exemption of White House, Supreme Court, and Capitol]

Nothing in this Act shall be construed to be applicable to the White House and its grounds, the Supreme Court building and its grounds, or the United States Capitol and its related buildings and grounds.

Section 108

[16 U.S.C. 470h — Establishment of Historic Preservation Fund; authorization for appropriations]

To carry out the provisions of this Act, there is hereby established the Historic Preservation Fund (hereafter referred to as the "fund") in the Treasury of the United States.

There shall be covered into such fund $24,400,000 for fiscal year 1977, $100,000,000 for fiscal year 1978, $100,000,000 for fiscal year 1979, $150,000,000 for fiscal year 1980 and $150,000,000 for fiscal year 1981 and $150,000,000 for each of fiscal years 1982 through 2015, from revenues due and payable to the United States under the Outer Continental Shelf Lands Act (67 Stat. 462, 469) as amended (43 U.S.C. 1338), and/or under section 7433(b) of Title 10, notwithstanding any provision of law that such proceeds shall be credited to miscellaneous receipts of the Treasury. Such moneys shall be used only to carry out the purposes of this Act and shall be available for expenditure only when appropriated by the Congress. Any moneys not appropriated shall remain available in the fund until appropriated for said purposes: *Provided*, That appropriations made pursuant to this paragraph may be made without fiscal year limitation.

Section 109

[16 U.S.C. 470h-1(a) — Donations to the Secretary]

(a) In furtherance of the purposes of this Act, the Secretary may accept the donation of funds which may be expended by him for projects to acquire, restore, preserve, or recover data from any district, building, structure, site, or object which is listed on the National Register of Historic Places established pursuant to section 101 of this Act, so long as the project is owned by a State, any unit of local government, or any nonprofit entity.

[16 U.S.C. 470h-1(b) — Expenditure of donated funds]

(b) In expending said funds, the Secretary shall give due consideration to the following factors: the national significance of the project; its historical value to the community; the imminence of its destruction or loss; and the expressed intentions of the donor. Funds expended under this subsection shall be made available without regard to the matching requirements established by section 102 of this Act, but the recipient of such funds shall be permitted to utilize them to match any grants from the Historic Preservation Fund established by section 108 of this Act.

[16 U.S.C. 470h-1(c) — Transfer of funds donated for the National Park Service]

(c) The Secretary is hereby authorized to transfer unobligated funds previously donated to the Secretary for purposes of the National Park Service, with the consent of the donor, and any funds so transferred shall be used or expended in accordance with the provisions of this Act.

Section 110

[16 U.S.C. 470h-2(a) — Federal agencies' responsibility to preserve and use historic properties]

(a) (1) The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency. Prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency in accordance with Executive Order No. 13006, issued May 21, 1996 (61 Fed. Reg. 26071). Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 101(g) of this Act, any preservation, as may be necessary to carry out this section.

[Each Federal agency to establish a preservation program to protect and preserve historic properties in consultation with others]

(2) Each Federal agency shall establish (unless exempted pursuant to Section 214) of this Act, in consultation with the Secretary, a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties. Such program shall ensure —

(A) that historic properties under the jurisdiction or control of the agency, are identified, evaluated, and nominated to the National Register;

(B) that such properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register are managed and maintained in a way that

considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 106 of this Act and gives special consideration to the preservation of such values in the case of properties designated as having National significance;

(C) that the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning;

(D) that the agency's preservation-related activities are carried out in consultation with other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations carrying out historic preservation planning activities, and with the private sector; and

(E) that the agency's procedures for compliance with section 106 of this Act —

(i) are consistent with regulations issued by the Council pursuant to section 211 of this Act;

(ii) provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with State Historic Preservation Officers, local governments, Indian tribes, Native Hawaiian organizations, and the interested public, as appropriate, regarding the means by which adverse effects on such properties will be considered; and

(iii) provide for the disposition of Native American cultural items from Federal or tribal land in a manner consistent with section 3(c) of the Native American Grave Protection and Repatriation Act (25 U.S.C. 3002(c)).

[16 U.S.C. 470h-2(b) — Recordation of historic properties prior to demolition]

(b) Each Federal agency shall initiate measures to assure that where, as a result of Federal action or assistance carried out by such agency, an historic property is to be substantially altered or demolished, timely steps are taken to make or have made appropriate records, and that such records then be deposited, in accordance with section 101(a) of this Act, in the Library of Congress or with such other appropriate agency as may be designated by the Secretary, for future use and reference.

[16 U.S.C. 470h-2(c) — Designation of Federal agency preservation officers]

(c) The head of each Federal agency shall, unless exempted under section 214 of this Act, designate a qualified official to be known as the agency's "preservation officer" who shall be responsible for coordinating that agency's activities under this Act. Each Preservation Officer may, in order to be considered qualified, satisfactorily complete an appropriate training program established by the Secretary under section 101(h) of this Act.

[16 U.S.C. 470h-2(d) — Conduct of agency programs consistent with Act]

(d) Consistent with the agency's mission and mandates, all Federal agencies shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this Act and, give consideration to programs and projects which will further the purposes of this Act.

[16 U.S.C. 470h-2(e) — Transfer of surplus Federal historic properties]

(e) The Secretary shall review and approve the plans of transferees of surplus federally owned historic properties not later than ninety days after his receipt of such plans to ensure that the prehistorical, historical, architectural, or culturally significant values will be preserved or enhanced.

[16 U.S.C. 470h-2(f) — Federal undertakings affecting National Historic Landmarks]

(f) Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

[16 U.S.C. 470h-2(g) — Preservation activities as an eligible project cost]

(g) Each Federal agency may include the costs of preservation activities of such agency under this Act as eligible project costs in all undertakings of such agency or assisted by such agency. The eligible project costs may also include amounts paid by a Federal agency to any State to be used in carrying out such preservation responsibilities of the Federal agency under this Act, and reasonable costs may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit.

[16 U.S.C. 470h-2(h) — Preservation awards program]

(h) The Secretary shall establish an annual preservation awards program under which he may make monetary awards in amounts not to exceed $1,000 and provide citations for special achievements to officers and employees of Federal, State, and certified local governments in recognition of their outstanding contributions to the preservation of historic resources. Such program may include the issuance of annual awards by the President of the United States to any citizen of the United States recommended for such award by the Secretary.

[16 U.S.C. 470h-2(i) — Applicability of National Environmental Policy Act]

(i) Nothing in this Act shall be construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required under the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.], and nothing is this Act shall be construed to provide any exemption from any requirement respecting the preparation of such a statement under such Act.

[16 U.S.C. 470h-2(j) — Disaster waivers]

(j) The Secretary shall promulgate regulations under which the requirements of this section may be waived in whole or in part in the event of a major natural disaster or an imminent threat to the national security.

[16 U.S.C. 470h-2(k) — Anticipatory demolition]

(k) Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 106 of this Act, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.

[16 U.S.C. 470h-2(l) — Documentation of Federal agency Section 106 decisions]

(l) With respect to any undertaking subject to section 106 of this Act which adversely affects any property included in or eligible for inclusion in the National Register, and for which a Federal agency has not entered into an agreement pursuant to regulations issued by the Council, the head of such agency shall document any decision made pursuant to section 106 of this Act. The head of such agency may not delegate his or her responsibilities pursuant to such section. Where a section 106 of this Act memorandum of agreement has been executed with respect to an undertaking, such memorandum shall govern the undertaking and all of its parts.

Section 111

[16 U.S.C. 470h-3(a) — Lease or exchange of Federal historic property]

(a) Notwithstanding any other provision of law, any Federal agency after consultation with the Council, shall, to the extent practicable, establish and implement alternatives for historic properties, including adaptive use, that are not needed for current or projected agency purposes, and may lease an historic property owned by the agency to any person or organization, or exchange any property owned by the agency with comparable historic property, if the agency head determines that the lease or exchange will adequately insure the preservation of the historic property.

[16 U.S.C. 470h-3(b) — Use of proceeds]

(b) The proceeds of any lease under subsection (a) of this section may, notwithstanding any other provision of law, be retained by the agency entering into such lease and used to defray the costs of administration, maintenance, repair, and related expenses incurred by the agency with respect to such property or other properties which are on the National Register which are owned by, or are under the jurisdiction or control of, such agency. Any surplus proceeds from such leases shall be deposited into the Treasury of the United States at the end of the second fiscal year following the fiscal year in which such proceeds were received.

[16 U.S.C. 470h-3(c) — Management contracts]

(c) The head of any Federal agency having responsibility for the management of any historic property may, after consultation with the Advisory Council on Historic Preservation, enter into contracts for the management of such property. Any such contract shall contain such terms and conditions as the head of such agency deems necessary or appropriate to protect the interests of the United States and insure adequate preservation of historic property.

Section 112

[16 U.S.C. 470h-4(a) — Each Federal agency is to protect historic resources through professionalism of employees and contractors]

(a) Each Federal agency that is responsible for the protection of historic resources, including archaeological resources pursuant to this Act or any other law shall ensure each of the following —

(1) (A) All actions taken by employees or contractors of such agency shall meet professional standards under regulations developed by the Secretary in consultation with the Council, other affected agencies, and the appropriate professional societies of the disciplines involved, specifically archaeology, architecture, conservation, history, landscape architecture, and planning.

(B) Agency personnel or contractors responsible for historic resources shall meet qualification standards established by the Office of Personnel Management in consultation with the Secretary and appropriate professional societies of the disciplines involved. The Office of Personnel Management shall revise qualification standards within 2 years after October 30, 1992, [the date of enactment of the 1992 Amendments to this Act] for the disciplines involved, specifically archaeology, architecture, conservation, curation, history, landscape architecture, and planning. Such standards shall consider the particular skills and expertise needed for the preservation of historic resources and shall be equivalent requirements for the disciplines involved.

[Maintaining permanent databases]

(2) Records and other data, including data produced by historical research and archaeological surveys and excavations are permanently maintained in appropriate data bases and made available to potential users pursuant to such regulations as the Secretary shall promulgate.

[16 U.S.C. 470h-4(b) — Secretary to promulgate guidelines to owners about protecting and preserving historic resources]

(b) In order to promote the preservation of historic resources on properties eligible for listing in the National Register, the Secretary shall, in consultation with the Council, promulgate guidelines to ensure that Federal, State, and tribal historic preservation programs subject to this Act include plans to —

(1) provide information to the owners of properties containing historic (including architectural, curatorial, and archaeological) resources with demonstrated or likely research significance, about the need for protection of such resources, and the available means of protection;

(2) encourage owners to preserve such resources intact and in place and offer the owners of such resources information on the tax and grant assistance available for the donation of the resources or of a preservation easement of the resources;

[Encourage protection of Native American cultural items and properties]

(3) encourage the protection of Native American cultural items (within the meaning of section 2 (3) and (9) of the Native American Grave Protection and Repatriation Act (25 U.S.C. 3001 (3) and (9))) and of properties of religious or cultural importance to Indian tribes, Native Hawaiians, or other Native American groups; and

[Conduct archeological excavations to meet Federal standards, allow access to artifacts for research, consult with Indian tribe or Native Hawaiian organization if related items likely]

(4) encourage owners who are undertaking archaeological excavations to —

(A) conduct excavations and analyses that meet standards for federally-sponsored excavations established by the Secretary;

(B) donate or lend artifacts of research significance to an appropriate research institution;

(C) allow access to artifacts for research purposes; and

(D) prior to excavating or disposing of a Native American cultural item in which an Indian tribe or Native Hawaiian organization may have an interest under section 3(a)(2) (B) or (C) of the Native American Grave Protection and Repatriation Act (25 U.S.C. 3002(a)(2) (B) and (C)), given notice to and consult with such Indian tribe or Native Hawaiian organization.

Section 113

[16 U.S.C. 470h-5(a) — Study to report ways to control illegal trafficking in]

(a) In order to help control illegal interstate and international traffic in antiquities, including archaeological, curatorial, and architectural objects, and historical documents of all kinds, the Secretary shall study and report on the suitability and feasibility of alternatives for controlling illegal interstate and international traffic in antiquities.

[16 U.S.C. 470h-5(b) — Consultation]

(b) In conducting the study described in subsection (a) of this section the Secretary shall consult with the Council and other Federal agencies that conduct, cause to be conducted, or permit archaeological surveys or excavations or that have responsibilities for other kinds of antiquities and with State Historic Preservation Officers, archaeological, architectural, historical, conservation, and curatorial organizations, Indian tribes, Native Hawaiian organizations, and other Native American organizations, international organizations and other interested persons.

[16 U.S.C. 470h-5(c) — Report]

(c) Not later than 18 months after October 30, 1992 [the date of enactment of this section], the Secretary shall submit to Congress a report detailing the Secretary's findings and recommendations from the study described in subsection (a) of this section.

[16 U.S.C. 470h-5(d) — Funding authorization]

(d) There are authorized to be appropriated not more than $500,000 for the study described in subsection (a) of this section, such sums to remain available until expended.

TITLE II

Section 201

[16 U.S.C. 470i(a) — Advisory Council on Historic Preservation; membership]

(a) There is established as an independent agency of the United States Government an Advisory Council on Historic Preservation which shall be composed of the following members:

(1) a Chairman appointed by the President selected from the general public;

(2) the Secretary of the Interior;

(3) the Architect of the Capitol;

(4) the Secretary of Agriculture and the heads of seven other agencies of the United States (other than the Department of the Interior), the activities of which affect historic preservation, designated by the President;

(5) one Governor appointed by the President;

(6) one mayor appointed by the President;

(7) the President of the National Conference of State Historic Preservation Officers;

(8) the Chairman of the National Trust for Historic Preservation;

(9) four experts in the field of historic preservation appointed by the President from the disciplines of architecture, history, archaeology, and other appropriate disciplines;

(10) three at-large members from the general public, appointed by the President; and

(11) one member of an Indian tribe or Native Hawaiian organization who represents the interests of the tribe or organization of which he or she is a member, appointed by the President.

[16 U.S.C. 470i(b) — Designees]

(b) Each member of the Council specified in paragraphs (2) through (8) other than (6) of subsection (a) of this section may designate another officer of his department, agency, or organization to serve on the Council in his stead, except that, in the case of paragraphs (2) and (4), no such officer other than an Assistant Secretary or an officer having major department-wide or agency-wide responsibilities may be so designated.

[16 U.S.C. 470i(c) — Term of office]

(c) Each member of the Council appointed under paragraph (1), and under paragraphs (9) through (11) of subsection (a) of this section shall serve for a term of four years from the expiration of his predecessor's term; except that the members first appointed under that paragraph shall serve for terms of one to four years, as designated by the President at the time of appointment, in such manner as to insure that the terms of not more than two of them will expire in any one year. The members appointed under paragraphs (5) and (6) shall serve for the term of their elected office but not in excess of four years. An appointed member may not serve more than two terms. An appointed member whose term has expired shall serve until that member's successor has been appointed.

[16 U.S.C. 470i(d) — Vacancies]

(d) A vacancy in the Council shall not affect its powers, but shall be filled not later than sixty days after such vacancy commences, in the same manner as the original appointment (and for the balance of any unexpired terms). The members of the Advisory Council on Historic Preservation appointed by the President under this Act as in effect on the day before December 12, 1980 [the enactment of the National Historic Preservation Act Amendments of 1980], shall remain in office until all members of the Council, as specified in this section, have been appointed. The members first appointed under this section shall be appointed not later than one hundred and eighty days after December 12, 1980 [the enactment of the National Historic Preservation Act Amendments of 1980].

[16 U.S.C. 470i(e) — Vice Chairman]

(e) The President shall designate a Vice Chairman, from the members appointed under paragraphs (5), (6), (9), or (10). The Vice Chairman may act in place of the Chairman during the absence or disability of the Chairman or when the office is vacant.

[16 U.S.C. 470i(f) — Quorum]

(f) 12 members of the Council shall constitute a quorum.

Section 202

[16 U.S.C. 470j(a) — Duties of Council]

(a) The Council shall —

(1) advise the President and the Congress on matters relating to historic preservation; recommend measures to coordinate activities of Federal, State, and local agencies and private institutions and individuals relating to historic preservation; and advise on the dissemination of information pertaining to such activities;

(2) encourage, in cooperation with the National Trust for Historic Preservation and appropriate private agencies, public interest and participation in historic preservation;

(3) recommend the conduct of studies in such areas as the adequacy of legislative and administrative statutes and regulations pertaining to historic preservation activities of State and local governments and the effects of tax policies at all levels of government on historic preservation;

(4) advise as to guidelines for the assistance of State and local governments in drafting legislation relating to historic preservation;

(5) encourage, in cooperation with appropriate public and private agencies and institutions, training and education in the field of historic preservation;

(6) review the policies and programs of Federal agencies and recommend to such agencies methods to improve the effectiveness, coordination, and consistency of those policies and programs with the policies and programs carried out under this Act; and

(7) inform and educate Federal agencies, State and local governments, Indian tribes, other nations and international organizations and private groups and individuals as to the Council's authorized activities.

[16 U.S.C. 470j(b) — Annual and special reports]

(b) The Council shall submit annually a comprehensive report of its activities and the results of its studies to the President and the Congress and shall from time to time submit such additional and special reports as it deems advisable. Each report shall propose such legislative enactments and other actions as, in the judgment of the Council, are necessary and appropriate to carry out its recommendations and shall provide the Council's assessment of current and emerging problems in the field of historic preservation and an evaluation of the effectiveness of the programs of Federal agencies, State and local governments, and the private sector in carrying out the purposes of this Act.

Section 203

[16 U.S.C. 470k — Information from agencies]

The Council is authorized to secure directly from any department, bureau, agency, board, commission, office, independent establishment or instrumentality of the executive branch of the Federal Government information,

suggestions, estimates, and statistics for the purpose of this title of the Act; and each such department, bureau, agency, board, commission, office, independent establishment or instrumentality is authorized to furnish such information, suggestions, estimates, and statistics to the extent permitted by law and within available funds.

Section 204

[16 U.S.C. 470l — Compensation of members]

The members of the Council specified in paragraphs (2), (3), and (4) of section 201(a) shall serve without additional compensation. The other members of the Council shall receive $100 per diem when engaged in the performance of the duties of the Council. All members of the Council shall receive reimbursement for necessary traveling and subsistence expenses incurred by them in the performance of the duties of the Council.

Section 205

[16 U.S.C. 470m(a) — Executive Director]

(a) There shall be an Executive Director of the Council who shall be appointed in the competitive service by the Chairman with the concurrence of the Council. The Executive Director shall report directly to the Council and perform such functions and duties as the Council may prescribe.

[16 U.S.C. 470m(b) — General Counsel and other attorneys]

(b) The Council shall have a General Counsel, who shall be appointed by the Executive Director. The General Counsel shall report directly to the Executive Director and serve as the Council's legal advisor. The Executive Director shall appoint such other attorneys as may be necessary to assist the General Counsel, represent the Council in courts of law whenever appropriate, including enforcement of agreements with Federal agencies to which the Council is a party, assist the Department of Justice in handling litigation concerning the Council in courts of law, and perform such other legal duties and functions as the Executive Director and the Council may direct.

[16 U.S.C. 470m(c) — Appointment and compensation of staff]

(c) The Executive Director of the Council may appoint and fix the compensation of such officers and employees in the competitive service as are necessary to perform the functions of the Council at rates not to exceed that now or hereafter prescribed for the highest rate for grade 15 of the General Schedule under section 5332 of title 5 [United States Code]: *Provided, however,* That the Executive Director, with the concurrence of the Chairman, may appoint and fix the compensation of not to exceed five employees in the competitive service at rates not to exceed that now or hereafter prescribed for the highest rate of grade 17 of the General Schedule under section 5332 of Title 5 [United States Code].

[16 U.S.C. 470m(d) — Appointment and compensation of additional personnel]

(d) The Executive Director shall have power to appoint and fix the compensation of such additional personnel as may be necessary to carry out its duties, without regard to the provisions of the civil service laws and the Classification Act of 1949 [chapter 51 and subchapter III of chapter 53 of Title 5, U.S. Code].

[16 U.S.C. 470m(e) — Expert and consultant services]

(e) The Executive Director of the Council is authorized to procure expert and consultant services in accordance with the provisions of section 3109 of title 5 [United States Code].

[16 U.S.C. 470m(f) — Financial and administrative services]

(f) Financial and administrative services (including those related to budgeting, accounting, financial reporting, personnel and procurement) shall be provided the Council by the Department of the Interior or, at the discretion of the Council, such other agency or private entity that reaches an agreement with the Council, for which payments shall be made in advance or by reimbursement from funds of the Council in such amounts as may be agreed upon by the Chairman of the Council and the head of the agency or, in the case of a private entity, the authorized representative of the private entity that will provide the services. When a Federal agency affords such services, the regulations of that agency for the collection of indebtedness of personnel resulting from erroneous payments (5 U.S.C. 5514(b)) shall apply to the collection of erroneous payments made to or on behalf of a Council employee and regulations of that agency for the administrative control of funds (31 U.S.C. 1513(d), 1514) shall apply to appropriations of the Council. The Council shall not be required to prescribe such regulations.

[16 U.S.C. 470m(g) — Use of funds, personnel, facilities, and services]

(g) Any Federal agency may provide the Council, with or without reimbursement as may be agreed upon by the Chairman and the agency, with such funds, personnel, facilities, and services under their jurisdiction and control as may be needed by the Council to carry out its duties, to the extent that such funds, personnel, facilities, and services are requested by the Council and are otherwise available for that purpose. Any funds provided to the Council pursuant to this subsection must be expended by the end of the fiscal year following the fiscal year in which the funds are received by the Council. To the extent of available appropriations, the Council may obtain, by purchase, rental, donation, or otherwise, such additional property, facilities, and services as may be needed to carry out its duties and may also receive donations of moneys for such purpose, and the Executive Director is authorized, in his discretion, to accept, hold, use, expend, and administer the same for the purposes of this Act.

Section 206

[16 U.S.C. 470n(a) — International Centre for the Study of the Preservation and Restoration of Cultural Property; authorization]

(a) The participation of the United States as a member of the International Centre for the Study of the Preservation and Restoration of Cultural Property is hereby authorized.

[16 U.S.C. 470n(b) — Members of official delegation]

(b) The Council shall recommend to the Secretary of State, after consultation with the Smithsonian Institution and other public and private organizations concerned with the technical problems of preservation, the members of the official delegation which will participate in the activities of the Centre on behalf of the United States. The Secretary of State shall appoint the members of the official delegation from the persons recommended to him by the Council.

[16 U.S.C. 470n(c) — Authorization for membership payment]

(c) For the purposes of this section there is authorized to be appropriated an amount equal to the assessment for United States membership in the Centre for fiscal years 1979, 1980, 1981, and 1982: *Provided*, That no appropriation is authorized and no payment shall be made to the Centre in excess of 25 per centum of the total annual assessment of such organization. Authorization for payment of such assessment shall begin in fiscal year 1981, but shall include earlier costs.

Section 207

[16 U.S.C. 470o — Transfer of personnel, funds, etc. to the Council]

So much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, held, used, programmed, or available or to be made available by the Department of the Interior in connection with the functions of the Council, as the Director of the Office of Management and Budget shall determine, shall be transferred from the Department to the Council within 60 days of the effective date of this Act [Pub. L. 94-422, September 28, 1976].

Section 208

[16 U.S.C. 470p — Rights of Council employees]

Any employee in the competitive service of the United States transferred to the Council under the provisions of this section shall retain all rights, benefits, and privileges pertaining thereto held prior to such transfer.

Section 209

[16 U.S.C. 470q — Exemption from Federal Advisory Committee Act]

The Council is exempt from the provisions of the Federal Advisory Committee Act (86 Stat. 770), and the provisions of subchapter II of chapter 5 and chapter 7, of Title 5 [U.S. Code] [the Administrative Procedure Act (80 Stat. 381)] shall govern the operations of the Council.

Section 210

[16 U.S.C. 470r — Direct Submission to the Congress]

No officer or agency of the United States shall have any authority to require the Council to submit its legislative recommendations, or testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress. In instances in which the Council voluntarily seeks to obtain the comments or review of any officer or agency of the United States, the Council shall include a description of such actions in its legislative recommendations, testimony, or comments on legislation which it transmits to the Congress.

Section 211

[16 U.S.C. 470s — Regulations for Section 106; local government participation]

The Council is authorized to promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 of this Act in its entirety. The Council shall, by regulation, establish such procedures as may be necessary to provide for participation by local governments in proceedings and other actions taken by the Council with respect to undertakings referred to in section 106 of this Act which affect such local governments.

Section 212

[16 U.S.C. 470t(a) — Council appropriation authorization]

(a) The Council shall submit its budget annually as a related agency of the Department of the Interior. There are authorized to be appropriated such amounts as may be necessary to carry out this title.

[16 U.S.C. 470t(b) — Concurrent submission of budget to Congress]

(b) Whenever the Council submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit copies of that estimate or request to the House

and Senate Appropriations Committees and the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources.

Section 213

[16 U.S.C. 470u — Reports from Secretary at request of Council]

To assist the Council in discharging its responsibilities under this Act, the Secretary at the request of the Chairman, shall provide a report to the Council detailing the significance of any historic property, describing the effects of any proposed undertaking on the affected property, and recommending measures to avoid, minimize, or mitigate adverse effects.

Section 214

[16 U.S.C. 470v — Exemptions for Federal activities from provisions of the Act]

The Council, with the concurrence of the Secretary, shall promulgate regulations or guidelines, as appropriate, under which Federal programs or undertakings may be exempted from any or all of the requirements of this Act when such exemption is determined to be consistent with the purposes of this Act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties.

Section 215

[16 U.S.C. 470v-1 — Reimbursement from State and local agencies, etc.]

Subject to applicable conflict of interest laws, the Council may receive reimbursements from State and local agencies and others pursuant to agreements executed in furtherance of the purposes of this Act.

Section 216

[16 U.S.C. 470v-2(a) — Cooperative Agreements]

(a) The Council may enter into a cooperative agreement with any Federal agency that administers a grant or assistance program for the purpose of improving the effectiveness of the administration of such program in meeting the purposes and policies of this Act. Such cooperative agreements may include provisions that modify the selection criteria for a grant or assistance program to further the purposes of this Act or that allow the Council to participate in the selection of recipients, if such provisions are not inconsistent with the grant or assistance program's statutory authorization and purpose.

[16 U.S.C. 470v-2(b) — Review of Grant and Assistance Programs]

(b) The Council may —

(1) review the operation of any Federal grant or assistance program to evaluate the effectiveness of such program in meeting the purposes and policies of this Act;

(2) make recommendations to the head of any Federal agency that administers such program to further the consistency of the program with the purposes and policies of the Act and to improve its effectiveness in carrying out those purposes and policies; and

(3) make recommendations to the President and Congress regarding the effectiveness of Federal grant and assistance programs in meeting the purposes and policies of this Act, including recommendations with regard to appropriate funding levels.

TITLE III

Section 301

[16 U.S.C. 470w — Definitions]

As used in this Act, the term —

(1) **"Agency"** means agency as such term is defined in section 551 of title 5 [United States Code].

(2) **"State"** means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and, upon termination of the Trusteeship Agreement for the Trust Territory of the Pacific Islands, the Republic of Palau.

(3) **"Local government"** means a city, county, parish, township, municipality, or borough, or any other general purpose political subdivision of any State.

(4) **"Indian tribe"** or **"tribe"** means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act [43 U.S.C. 1602], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(5) **"Historic property"** or **"historic resource"** means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource.

(6) **"National Register"** or **"Register"** means the National Register of Historic Places established under section 101 of this Act.

(7) **"Undertaking"** means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including —

(A) those carried out by or on behalf of the agency;

(B) those carried out with Federal financial assistance;

(C) those requiring a Federal permit license, or approval; and

(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

(8) **"Preservation"** or **"historic preservation**" includes identification, evaluation, recordation, documentation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance, research, interpretation, conservation, and education and training regarding the foregoing activities, or any combination of the foregoing activities.

(9) **"Cultural park"** means a definable area which is distinguished by historic resources and land related to such resources and which constitutes an interpretive, educational, and recreational resource for the public at large.

(10) **"Historic conservation district"** means an area which contains

(A) historic properties,

(B) buildings having similar or related architectural characteristics,

(C) cultural cohesiveness, or

(D) any combination of the foregoing.

(11) **"Secretary"** means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.

(12) **"State Historic Preservation Review Board"** means a board, council, commission, or other similar collegial body established as provided in section 101(b)(1)(B) of this Act —

(A) the members of which are appointed by the State Historic Preservation Officer (unless otherwise provided for by State law),

(B) a majority of the members of which are professionals qualified in the following and related disciplines: history, prehistoric and historic archaeology, architectural history, architecture, folklore, cultural anthropology, curation, conservation, and landscape architecture, and

(C) which has the authority to —

(i) review National Register nominations and appeals from nominations;

(ii) review appropriate documentation submitted in conjunction with the Historic Preservation Fund;

(iii) provide general advice and guidance to the State Historic Preservation Officer; and

(iv) perform such other duties as may be appropriate.

(13) **"Historic preservation review commission"** means a board, council, commission, or other similar collegial body which is established by State or local legislation as provided in section 101(c)(1)(B) of this Act, and the members of which are appointed, unless otherwise provided by State or local legislation, by the chief elected official of the jurisdiction concerned from among —

(A) professionals in the disciplines of architecture, history, architectural history, planning, prehistoric and historic archaeology, folklore, cultural anthropology, curation, conservation, and landscape architecture, or related disciplines, to the extent such professionals are available in the community concerned, and

(B) such other persons as have demonstrated special interest, experience, or knowledge in history, architecture, or related disciplines and as will provide for an adequate and qualified commission.

(14) **"Tribal lands"** means —

(A) all lands within the exterior boundaries of any Indian reservation; and

(B) all dependent Indian communities.

(15) **"Certified local government"** means a local government whose local historic preservation program has been certified pursuant to section 101(c) of this Act.

(16) **"Council"** means the Advisory Council on Historic Preservation established by section 201 of this Act.

(17) **"Native Hawaiian"** means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(18) **"Native Hawaiian organization"** means any organization which —

(A) serves and represents the interests of Native Hawaiians;

(B) has as a primary and stated purpose the provision of services to Native Hawaiians; and

(C) has demonstrated expertise in aspects of historic preservation that are culturally significant to Native Hawaiians.

The term includes, but is not limited to, the Office of Hawaiian Affairs of the State of Hawaii and Hui Malama I Na Kupuna O Hawai'i Nei, an organization incorporated under the laws of the State of Hawaii.

Section 302

[16 U.S.C. 470w-1 — Authority to expend funds for purposes of this Act]

Where appropriate, each Federal agency is authorized to expend funds appropriated for its authorized programs for the purposes of activities carried out pursuant to this Act, except to the extent appropriations legislation expressly provides otherwise.

Section 303

[16 U.S.C. 470w-2(a) — Donations to Secretary; money and personal property]

(a) The Secretary is authorized to accept donations and bequests of money and personal property for the purposes of this Act and shall hold, use, expend, and administer the same for such purposes.

[16 U.S.C. 470w-2(b) — Donations of less than fee interests in real property]

(b) The Secretary is authorized to accept gifts or donations of less than fee interests in any historic property where the acceptance of such interests will facilitate the conservation or preservation of such properties. Nothing in this section or in any provision of this Act shall be construed to affect or impair any other authority of the Secretary under other provision of law to accept or acquire any property for conservation or preservation or for any other purpose.

Section 304

[16 U.S.C. 470w-3(a) — Confidentiality of the location of sensitive historic resources]

(a) The head of a Federal agency or other public official receiving grant assistance pursuant to this Act, after consultation with the Secretary, shall withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may —

(1) cause a significant invasion of privacy;

(2) risk harm to the historic resources; or

(3) impede the use of a traditional religious site by practitioners.

[16 U.S.C. 470w-3(b) — Access Determination]

(b) When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to subsection (a) of this section, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purpose of carrying out this Act.

[16 U.S.C. 470w-3(c) — Consultation with the Advisory Council]

(c) When the information in question has been developed in the course of an agency's compliance with section 106 or 110(f) of this Act, the Secretary shall consult with the Council in reaching determinations under subsections (a) and (b) of this section.

Section 305

[16 U.S.C. 470w-4 — Attorneys' fees]

In any civil action brought in any United States district court by any interested person to enforce the provisions of this Act, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

Section 306

[16 U.S.C. 470w-5(a) — National Center for the Building Arts]

(a) In order to provide a national center to commemorate and encourage the building arts and to preserve and maintain a nationally significant building which exemplifies the great achievements of the building arts in the United States, the Secretary and the Administrator of the General Services Administration are authorized and directed to enter into a cooperative agreement with the Committee for a National Museum of the Building Arts, Incorporated, a nonprofit corporation organized and existing under the laws of the District of Columbia, or its successor, for the operation of a National Museum for the Building Arts in the Federal Building located in the block bounded by Fourth Street, Fifth Street, F Street, and G Street, Northwest in Washington, District of Columbia. Such museum shall —

(1) collect and disseminate information concerning the building arts, including the establishment of a national reference center for current and historic documents, publications, and research relating to the building arts;

(2) foster educational programs relating to the history, practice and contribution to society of the building arts, including promotion of imaginative educational approaches to enhance understanding and appreciation of all facets of the building arts;

(3) publicly display temporary and permanent exhibits illustrating, interpreting and demonstrating the building arts;

(4) sponsor or conduct research and study into the history of the building arts and their role in shaping our civilization; and

(5) encourage contributions to the building arts.

[16 U.S.C. 470w-5(b) — Cooperative agreement]

(b) The cooperative agreement referred to in subsection (a) of this section shall include provisions which —

(1) make the site available to the Committee referred to in subsection (a) of this section without charge;

(2) provide, subject to available appropriations, such maintenance, security, information, janitorial and other services as may be necessary to assure the preservation and operation of the site; and

(3) prescribe reasonable terms and conditions by which the Committee can fulfill its responsibilities under this Act.

[16 U.S.C. 470w-5(c) — Grants to Committee]

(c) The Secretary is authorized and directed to provide matching grants-in-aid to the Committee referred to in subsection (a) of this section for its programs related to historic preservation. The Committee shall match such grants-in-aid in a manner and with such funds and services as shall be satisfactory to the Secretary, except that no more than $500,000 may be provided to the Committee in any one fiscal year.

[16 U.S.C. 470w-5(d) — Site renovation]

(d) The renovation of the site shall be carried out by the Administrator with the advice of the Secretary. Such renovation shall, as far as practicable —

(1) be commenced immediately,

(2) preserve, enhance, and restore the distinctive and historically authentic architectural character of the site consistent with the needs of a national museum of the building arts and other compatible use, and

(3) retain the availability of the central court of the building, or portions thereof, for appropriate public activities.

[16 U.S.C. 470w-5(e) — Annual report]

(e) The Committee shall submit an annual report to the Secretary and the Administrator concerning its

activities under this section and shall provide the Secretary and the Administrator with such other information as the Secretary may, from time to time, deem necessary or advisable.

[16 U.S.C. 470w-5(f) — Definition of "building arts"]

(f) For purposes of this section, the term **"building arts"** includes, but shall not be limited to, all practical and scholarly aspects of prehistoric, historic, and contemporary architecture, archaeology, construction, building technology and skills, landscape architecture, preservation and conservation, building and construction, engineering, urban and community design and renewal, city and regional planning, and related professions, skills, trades, and crafts.

Section 307

[16 U.S.C. 470w-6(a) — Effective date of regulations]

(a) No final regulation of the Secretary shall become effective prior to the expiration of thirty calendar days after it is published in the Federal Register during which either or both Houses of Congress are in session.

[16 U.S.C. 470w-6(b) — Congressional disapproval of regulations]

(b) The regulation shall not become effective if, within ninety calendar days of continuous session of Congress after the date of promulgation, both Houses of Congress adopt a concurrent resolution, the matter after the resolving clause of which is as follows: "That Congress disapproves the regulation promulgated by the Secretary dealing with the matter of_____, which regulation was transmitted to Congress on_____," the blank spaces therein being appropriately filled.

[16 U.S.C. 470w-6(c) — Inaction by Congress]

(c) If at the end of sixty calendar days of continuous session of Congress after the date of promulgation of a regulation, no committee of either House of Congress has reported or been discharged from further consideration of a concurrent resolution disapproving the regulation, and neither House has adopted such a resolution, the regulation may go into effect immediately. If, within such sixty calendar days, such a committee has reported or been discharged form further consideration of such a resolution, the regulation may go into effect not sooner than ninety calendar days of continuous session of Congress after its promulgation unless disapproved as provided for.

[16 U.S.C. 470w-6(d) — Definitions]

(d) For the purposes of this section-

(1) continuity of session is broken only by an adjournment sine die; and

(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of sixty and ninety calendar days of continuous session of Congress.

[16 U.S.C. 470w-6(e) — Effect of Congressional inaction]

(e) Congressional inaction on or rejection of a resolution of disapproval shall not be deemed an expression of approval of such regulation.

Section 308

[16 U.S.C. 470w-7(a) — National historic light station program]

(a) In order to provide a national historic light station program, the Secretary shall —

(1) collect and disseminate information concerning historic light stations, including historic lighthouses and associated structures;

(2) foster educational programs relating to the history, practice, and contribution to society of historic light stations;

(3) sponsor or conduct research and study into the history of light stations;

(4) maintain a listing of historic light stations; and

(5) assess the effectiveness of the program established by this section regarding the conveyance of historic light stations.

[16 U.S.C. 470w-7(b) — Conveyance of Historic Light Stations]

(b) (1) Not later than 1 year after the date of the enactment of this section, the Secretary and the Administrator shall establish a process and policies for identifying, and selecting, an eligible entity to which a historic light station could be conveyed for education, park, recreation, cultural, or historic preservation purposes, and to monitor the use of such light station by the eligible entity.

(2) The Secretary shall review all applications for the conveyance of a historic light station, when the agency with administrative jurisdiction over the historic light station has determined the property to be `excess property' as that term is defined in the Federal Property Administrative Services Act of 1949 (40 U.S.C. 472(e)), and forward to the Administrator a single approved application for the conveyance of the historic light station. When selecting an eligible entity, the Secretary shall consult with the State Historic Preservation Officer of the State in which the historic light station is located.

(3) (A) Except as provided in subparagraph (B), the Administrator shall convey, by quitclaim deed, without consideration, all right, title, and interest of the United States in and to the historic light station, subject to the conditions set forth in subsection (c) after the Secretary's selection of an eligible entity. The conveyance of a historic light station under this section shall not be subject to the provisions of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11301 et seq.) or section 416(d) of the Coast Guard Authorization Act of 1998 (Public Law 105-383).

(B) (i) Historic light stations located within the exterior boundaries of a unit of the National Park System or a refuge within the National Wildlife Refuge System shall be conveyed or sold only with the approval of the Secretary.

(ii) If the Secretary approves the conveyance of a historic light station referenced in this paragraph, such conveyance shall be subject to the conditions set forth in subsection (c) and any other terms or conditions the Secretary considers necessary to protect the resources of the park unit or wildlife refuge.

(iii) If the Secretary approves the sale of a historic light station referenced in this paragraph, such sale shall be subject to the conditions set forth in subparagraphs (A) through (D) and (H) of subsection (c)(1) and subsection (c)(2) and any other terms or conditions the Secretary considers necessary to protect the resources of the park unit or wildlife refuge.

(iv) For those historic light stations referenced in this paragraph, the Secretary is encouraged to enter into cooperative agreements with appropriate eligible entities, as provided in this Act, to the extent such cooperative agreements are consistent with the Secretary's responsibilities to manage and administer the park unit or wildlife refuge, as appropriate.

[16 U.S.C. 470w-7(c) — Terms of Conveyance]

(c) (1) The conveyance of a historic light station shall be made subject to any conditions, including the reservation of easements and other rights on behalf of the United States, the Administrator considers necessary to ensure that —

(A) the Federal aids to navigation located at the historic light station in operation on the date of conveyance remain the personal property of the United States and continue to be operated and maintained by the United States for as long as needed for navigational purposes;

(B) there is reserved to the United States the right to remove, replace, or install any Federal aid to navigation located at the historic light station as may be necessary for navigational purposes;

(C) the eligible entity to which the historic light station is conveyed under this section shall not interfere or allow interference in any manner with any Federal aid to navigation, nor hinder activities required for the operation and maintenance of any Federal aid to navigation, without the express written permission of the head of the agency responsible for maintaining the Federal aid to navigation;

(D) the eligible entity to which the historic light station is conveyed under this section shall, at its own cost and expense, use and maintain the historic light station in accordance with this Act, the Secretary of the Interior's Standards for the Treatment of Historic Properties, 36 CFR part 68, and other applicable laws, and any proposed changes to the historic light station shall be reviewed and approved by the Secretary in consultation with the State Historic Preservation Officer of the State in which the historic light station is located, for consistency with 36 CFR part 800.5(a)(2)(vii), and the Secretary of the Interior's Standards for Rehabilitation, 36 CFR part 67.7;

(E) the eligible entity to which the historic light station is conveyed under this section shall make the historic light station available for education, park, recreation, cultural or historic preservation purposes for the general public at reasonable times and under reasonable conditions;

(F) the eligible entity to which the historic light station is conveyed shall not sell, convey, assign, exchange, or encumber the historic light station, any part thereof, or any associated historic artifact conveyed to the eligible entity in conjunction with the historic light station conveyance, including but not limited to any lens or lanterns,

unless such sale, conveyance, assignment, exchange or encumbrance is approved by the Secretary;

(G) the eligible entity to which the historic light station is conveyed shall not conduct any commercial activities at the historic light station, any part thereof, or in connection with any associated historic artifact conveyed to the eligible entity in conjunction with the historic light station conveyance, in any manner, unless such commercial activities are approved by the Secretary; and

(H) the United States shall have the right, at any time, to enter the historic light station conveyed under this section without notice, for purposes of operating, maintaining, and inspecting any aid to navigation and for the purpose of ensuring compliance with this subsection, to the extent that it is not possible to provide advance notice.

(2) Any eligible entity to which a historic light station is conveyed under this section shall not be required to maintain any Federal aid to navigation associated with a historic light station, except any private aids to navigation permitted under section 83 of title 14, United States Code, to the eligible entity.

(3) In addition to any term or condition established pursuant to this subsection, the conveyance of a historic light station shall include a condition that the historic light station, or any associated historic artifact conveyed to the eligible entity in conjunction with the historic light station conveyance, including but not limited to any lens or lanterns, at the option of the Administrator, shall revert to the United States and be placed under the administrative control of the Administrator, if —

(A) the historic light station, any part thereof, or any associated historic artifact ceases to be available for education, park, recreation, cultural, or historic preservation purposes for the general public at reasonable times and under reasonable conditions which shall be set forth in the eligible entity's application;

(B) the historic light station or any part thereof ceases to be maintained in a manner that ensures its present or future use as a site for a Federal aid to navigation;

(C) the historic light station, any part thereof, or any associated historic artifact ceases to be maintained in compliance with this Act, the Secretary of the Interior's Standards for the Treatment of Historic Properties, 36 CFR part 68, and other applicable laws;

(D) the eligible entity to which the historic light station is conveyed, sells, conveys, assigns, exchanges, or encumbers the historic light station, any part thereof, or any associated historic artifact, without approval of the Secretary;

(E) the eligible entity to which the historic light station is conveyed, conducts any commercial activities at the historic light station, any part thereof, or in conjunction with any associated historic artifact, without approval of the Secretary; or

(F) At least 30 days before the reversion, the Administrator provides written notice to the owner that the historic light station or any part thereof is needed for national security purposes.

[16 U.S.C. 470w-7(d) — Description of Property]

(d) (1) The Administrator shall prepare the legal description of any historic light station conveyed under this section. The Administrator, in consultation with the Commandant, United States Coast Guard, and the Secretary, may retain all right, title, and interest of the United States in and to any historical artifact, including any lens or lantern, that is associated with the historic light station and located at the light station at the time of conveyance. Wherever possible, such historical artifacts should be used in interpreting that station. In cases where there is no method for preserving lenses and other artifacts and equipment in situ, priority should be given to preservation or museum entities most closely associated with the station, if they meet loan requirements.

(2) Artifacts associated with, but not located at, the historic light station at the time of conveyance shall remain the personal property of the United States under the administrative control of the Commandant, United States Coast Guard.

(3) All conditions placed with the quitclaim deed of title to the historic light station shall be construed as covenants running with the land.

(4) No submerged lands shall be conveyed under this section.

[16 U.S.C. 470w-7(e) — Definitions]

(e) For purposes of this section:

(1) The term **"Administrator"** shall mean the Administrator of General Services.

(2) The term **"historic light station"** includes the light tower, lighthouse, keepers dwelling, garages, storage sheds, oil house, fog signal building, boat house, barn, pumphouse, tramhouse support structures, piers, walkways, underlying and appurtenant land and related real property and improvements associated therewith; *provided* that the `historic light station' shall be included in or eligible for inclusion in the National Register of Historic Places.

(3) The term **"eligible entity"** shall mean:

(A) any department or agency of the Federal Government; or

(B) any department or agency of the State in which the historic light station is located, the local government of the community in which the historic light station is located, nonprofit corporation, educational agency, or community development organization that —

(i) has agreed to comply with the conditions set forth in subsection (c) and to have such conditions recorded with the deed of title to the historic light station; and

(ii) is financially able to maintain the historic light station in accordance with the conditions set forth in subsection (c).

(4) The term **"Federal aid to navigation"** shall mean any device, operated and maintained by the United States, external to a vessel or aircraft, intended to assist a navigator to determine position or safe course, or to warn of dangers or obstructions to navigation, and shall include, but not be limited to, a light, lens, lantern, antenna, sound signal, camera, sensor, electronic navigation equipment, power source, or other associated equipment.

(5) The term **"Secretary"** means the Secretary of the Interior.

Section 309

[16 U.S.C. 470w-8(a) — Historic Light Station Sales]

(a) In the event no applicants are approved for the conveyance of a historic light station pursuant to section 308, the historic light station shall be offered for sale. Terms of such sales shall be developed by the Administrator of General Services and consistent with the requirements of section 308, subparagraphs (A) through (D) and (H) of subsection (c)(1), and subsection (c)(2). Conveyance documents shall include all necessary covenants to protect the historical integrity of the historic light station and ensure that any Federal aid to navigation located at the historic light station is operated and maintained by the United States for as long as needed for that purpose.

[16 U.S.C. 470w-8(b) — Net sale proceeds]

(b) Net sale proceeds from the disposal of a historic light station —

(1) located on public domain lands shall be transferred to the National Maritime Heritage Grant Program, established by the National Maritime Heritage Act of 1994 (Public Law 103-451) within the Department of the Interior; and

(2) under the administrative control of the Coast Guard shall be credited to the Coast Guard's Operating Expenses appropriation account, and shall be available for obligation and expenditure for the maintenance of light stations remaining under the administrative control of the Coast Guard, such funds to remain available until expended and shall be available in addition to funds available in the Operating Expense appropriation for this purpose.

There are hereby authorized to be appropriated to the Secretary of the Interior such sums as may be necessary to carry out this Act.

TITLE IV

Section 401

[16 U.S.C. 470x — National initiative to coordinate and promote research, distribute information and provide training about preservation skills and technologies]

The Congress finds and declares that, given the complexity of technical problems encountered in preserving historic properties and the lack of adequate distribution of technical information to preserve such properties, a national initiative to coordinate and promote research, distribute information, and provide training about preservation skills and technologies would be beneficial.

Section 402

[16 U.S.C. 470x-1— Definitions]

For the purposes of this title —

(1) The term **"Board"** means the National Preservation Technology and Training Board established pursuant to section 404 of this Act.

(2) The term **"Center"** means the National Center for Preservation Technology and Training established pursuant to section 403 of this Act.

(3) The term **"Secretary"** means the Secretary of the Interior.

Section 403

[16 U.S.C. 470x-2(a) — Establish a National Center for Preservation Technology and Training]

(a) There is hereby established within the Department of the Interior a National Center for Preservation Technology and Training. The Center shall be located at Northwestern State University of Louisiana in Nacthitoches, Louisiana.

[16 U.S.C. 470x-2(b) — Purposes of Center]

(b) The purposes of the Center shall be to —

(1) develop and distribute preservation and conservation skills and technologies for the identification, evaluation, conservation, and interpretation of prehistoric and historic resources;

(2) develop and facilitate training for Federal, State and local resource preservation professionals, cultural resource managers, maintenance personnel, and others working in the preservation field;

(3) take steps to apply preservation technology benefits from ongoing research by other agencies and institutions;

(4) facilitate the transfer of preservation technology among Federal agencies, State and local governments, universities, international organizations, and the private sector; and

(5) cooperate with related international organizations including, but not limited to the International Council on Monuments and Sites, the International Center for the Study of Preservation and Restoration of Cultural Property, and the International Council on Museums.

[16 U.S.C. 470x-2(c) — Programs]

(c) Such purposes shall be carried out through research, professional training, technical assistance, and programs for public awareness, and through a program of grants established under section 405 of this Act.

[16 U.S.C. 470x-2(d) — Executive Director]

(d) The Center shall be headed by an Executive Director with demonstrated expertise in historic preservation appointed by the Secretary with advice of the Board.

[16 U.S.C. 470x-2(e) — Assistance from Secretary]

(e) The Secretary shall provide the Center assistance in obtaining such personnel, equipment, and facilities as may be needed by the Center to carry out its activities.

Section 404

[16 U.S.C. 470x-3(a) — Establish a Preservation Technology and Training Board]

(a) There is established a Preservation Technology and Training Board.

[16 U.S.C. 470x-3(b) — Duties]

(b) The Board shall —

(1) provide leadership, policy advice, and professional oversight to the Center;

(2) advise the Secretary on priorities and the allocation of grants among the activities of the Center; and

(3) submit an annual report to the President and the Congress.

[16 U.S.C. 470x-3(c) — Membership]

(c) The Board shall be comprised of —

(1) The Secretary, or the Secretary's designee;

(2) 6 members appointed by the Secretary who shall represent appropriate Federal, State, and local agencies, State and local historic preservation commissions, and other public and international organizations; and

(3) 6 members appointed by the Secretary on the basis of outstanding professional qualifications who represent major organizations in the fields of archaeology, architecture, conservation, curation, engineering, history, historic preservation, landscape architecture, planning, or preservation education.

Section 405

[16 U.S.C. 470x-4(a) — Grants for research, information distribution and skill training]

(a) The Secretary, in consultation with the Board, shall provide preservation technology and training grants to eligible applicants with a demonstrated institutional capability and commitment to the purposes of the Center, in order to ensure an effective and efficient system of research, information distribution and skills training in all the related historic preservation fields.

[16 U.S.C. 470x-4(b) — Grant Requirements]

(b) (1) Grants provided under this section shall be allocated in such a fashion to reflect the diversity of the historic preservation fields and shall be geographically distributed.

(2) No grant recipient may receive more than 10 percent of the grants allocated under this section within any year.

(3) The total administrative costs, direct and indirect, charged for carrying out grants under this section may not exceed 25 percent of the aggregate costs.

[16 U.S.C. 470x-4(c) — Eligible applicants]

(c) Eligible applicants may include Federal and non-Federal laboratories, accredited museums, universities, non-profit organizations; offices, units, and Cooperative Park Study Units of the National Park System, State Historic Preservation Offices, tribal preservation offices, and Native Hawaiian organizations.

[16 U.S.C. 470x-4(d) — Standards]

(d) All such grants shall be awarded in accordance with accepted professional standards and methods, including peer review of projects.

[16 U.S.C. 470x-4(e) — Authorization of appropriations]

(e) There is authorized to be appropriated to carry out this section such sums as may be necessary.

Section 406

[16 U.S.C. 470x-5(a) — Center may accept grants, donations, and other Federal funds; may enter into contracts and cooperative agreements]

(a) The Center may accept —

(1) grants and donations from private individuals, groups, organizations, corporations, foundations, and other entities; and

(2) transfers of funds from other Federal agencies.

[16 U.S.C. 470x-5(b) — Contracts and cooperative agreements]

(b) Subject to appropriations, the Center may enter into contracts and cooperative agreements with Federal, State, local, and tribal governments, Native Hawaiian organizations, educational institutions, and other public entities to carry out the Center's responsibilities under this title of the Act.

[16 U.S.C. 470x-5(c) — Authorization of appropriations]

(c) There are authorized to be appropriated such sums as may be necessary for the establishment, operation, and maintenance of the Center. Funds for the Center shall be in addition to existing National Park Service programs, centers, and offices.

Section 407

[16 U.S.C. 470x-6 — Improve use of existing NPS centers and regional offices]

In order to improve the use of existing National Park Service resources, the Secretary shall fully utilize and further develop the National Park Service preservation (including conservation) centers and regional offices. The Secretary shall improve the coordination of such centers and offices within the National Park Service, and shall, where appropriate, coordinate their activities with the Center and with other appropriate parties.

[Addendum]

[National Historic Preservation Act Amendments of 1980, Public Law 96-515, December 12, 1980, 94 Stat. 3000

This addendum contains related legislative provisions enacted in the National Historic Preservation Act Amendments of 1980 but that are not part of the National Historic Preservation Act.]

Section 401

[16 U.S.C. 470a-1(a) — International activities and World Heritage Convention]

(a) The Secretary of the Interior shall direct and coordinate United States participation in the Convention Concerning the Protection of the World Cultural and Natural Heritage, approved by the Senate on October 26, 1973, in cooperation with the Secretary of State, the Smithsonian Institution, and the Advisory Council on Historic Preservation. Whenever possible, expenditures incurred in carrying out activities in cooperation with other nations and international organizations shall be paid for in such excess currency of the country or area where the expense is incurred as may be available to the United States.

[16 U.S.C. 470a-1(b) — Nominations of properties to World Heritage List]

(b) The Secretary of the Interior shall periodically nominate properties he determines are of international significance to the World Heritage Committee on behalf of the United States. No property may be so nominated unless it has previously been determined to be of national significance. Each such nomination shall include evidence of such legal protections as may be necessary to ensure preservation of the property and its environment (including restrictive covenants, easements, or other forms of protection). Before making any such nomination, the Secretary shall notify the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate.

[16 U.S.C. 470a-1(c) — Concurrence of non-Federal property]

(c) No non-Federal property may be nominated by the Secretary of the Interior to the World Heritage Committee for inclusion on the World Heritage List unless the owner of the property concurs in writing to such nomination.

Section 402

[16 U.S.C. 470a-2 — International Federal activities affecting historic properties]

Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.

CULTURAL HERITAGE CHARTERS AND STANDARDS

JK GILLON



CULTURAL HERITAGE CHARTERS AND STANDARDS

The first attempt to establish a coherent and logically defensible philosophy for building conservation was in the Society for the Protection of Ancient Building's Manifesto of 1877. The Manifesto consists principally of a plea to "put protection in place of restoration", and only the last two paragraphs commend a philosophy of care. However, it is the relatively brief Manifesto statement that marks the starting point for the many later policy statements in which the underlying theme of the SPAB Manifesto is adopted and developed rather than being significantly amended.

The Athens Conference of 1931, organised by the International Museums Office, established basic principles for an international code of practice for conservation. The Second International Congress of Architects and Technicians of Historic Monuments, which met in Venice in May 1964, approved the text of an International Charter for the Conservation of Monuments and Sites (the Venice Charter), which superseded the Athens

technology of conservation applied to monuments, historic areas and sites. The Venice Charter stresses the importance of setting, respect for original fabric, precise documentation of any intervention, the significance of contributions from all periods to the building's character, and the maintenance of historic buildings for a socially useful purpose. The Charter outlines the basic doctrine of what is now accepted to be an appropriate approach to dealing in philosophical terms with historic buildings. The full text of the Venice Charter and other documents detailed in this report can be viewed on the ICOMOS and UNESCO web sites.

The Venice Charter was followed by a plethora of other standards, charters, formal recommendations and conventions relating to building conservation. These provide invaluable guidance for practitioners working in the field of building conservation and are an essential framework for good practice in the protection and enhancement of the historic environment. The most significant of these that have the approval of ICOMOS are:

The Florence Charter on Historic Gardens (1982). Provides a definition of the term historic garden and the architectural compositions that constitute the historic landscape. It emphasises the need to identify and list historic gardens, and provides philosophical guidance on maintenance, conservation, restoration and reconstruction. It refers back to the Venice Charter for many of its principles.

The Washington Charter on the Conservation of Historic Towns and Areas (1987). A particularly useful document that considers broad principles for the planning and protection of historic urban areas.

Charter for the Protection and Management of the Archaeological Heritage (1990). Considers the subject of archaeology under the following headings: definitions, integrated protection policies, legislation, survey, maintenance and conservation, presentation, re-construction, and international co-operation.

Resolution of the Symposium on the Introduction of Contemporary Architecture into Ancient Groups of Buildings (1972). Stresses the need for appropriate use of mass, scale, rhythm and appearance, and the avoidance of imitation.

Resolution on the Conservation of Smaller Towns (1975). Considers the potential threats to such places, which are detailed as: lack of economic activity, outward movement of population, disruption of structures due to insertion of new elements, and measures to adapt to modern activities. Methods of counteracting these threats are then considered.

Declaration of Amsterdam (Congress on the European Architectural Heritage, 1975). Notes that the significance of the architectural heritage and the justification for conserving it are now more clearly perceived, and considers processes that would place the conservation of the architectural heritage on firm and lasting foundations. The importance of integrating conservation of the architectural heritage into the urban and regional planning process is identified as one of the most important factors.

settlements and the traditional environment of such places.

The Burra Charter The Australian ICOMOS Charter for the Conservation of Places of Cultural Significance (1981). This Charter develops the principles detailed in the Venice Charter to suit local Australian requirements. It includes a comprehensive list of definitions of items such as place, fabric, conservation, maintenance, preservation, restoration, reconstruction, adaptation and compatible use. It also introduces the concept of cultural significance, the 'aesthetic, historic, scientific or social value for past, present and future generations', and requires this to be defined for each place, and conservation plans to be established and justified prior to any intervention. It continues with a description of conservation principles and processes that are intended as a definition of good practice. The Burra Charter is well established in Australia and is frequently used by the Australian Government in its formal capacity.

The Appleton Charter for the Protection and Enhancement of the Built Environment (ICOMOS Canada, 1983). Considers levels of intervention in the historic environment, notes that respect for original fabric is a fundamental basis for the activities of protection and enhancement, and considers good practice in terms of documentation, avoidance of conjecture, distinguishability of new work, use of traditional materials and techniques, maintenance of patina, reversibility and respect for the integrity of the structure.

Charter for the Conservation of Places of Cultural Heritage Value (ICOMOS New Zealand, 1992). Provides comprehensive definitions of the processes involved in conservation, and sets out principles to guide the conservation of places of cultural heritage value in New Zealand. It aims to provide a frame of reference as guidelines for appropriate professional practice. Although written for use in New Zealand, the basic principles are generally applicable and follow the spirit of the Venice Charter.

Preservation Charter for the Historic Towns and Areas of the United States of America (US ICOMOS, 1992). Sets down a comprehensive statement concerning the importance of historic town, neighbourhoods and places, and states what should be done to tackle preservation issues in a coherent and thorough manner.

Guidelines for Education and Training in the Conservation of Monuments, Ensembles and Sites (1993). The aim of this document is to promote the establishment of standards and guidelines for education and training in the conservation of historic buildings, historic areas and towns, archaeological sites, and cultural landscapes. It emphasises the need to develop a holistic approach to heritage issues and sets out the relevant skills that are required.

UNESCO RECOMMENDATIONS AND OTHER STANDARDS

The United Nations Educational and Scientific Organisation (UNESCO) was founded in 1947 and has promoted various Conventions and other instruments for the conservation of the cultural heritage. A selection of these are:

Recommendations on International Principles Applicable to Archaeological Excavations (1956). Deals with general principles and regulations governing excavations and the trade in antiquities.

Recommendations Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites (1962). Considers preventative measures aimed at protecting natural, rural and urban landscapes and sites, whether natural or man-made, which have cultural or aesthetic interest.

Recommendations Concerning the Preservation of Cultural Property Endangered by Public or Private Works (1968). Considers preventative and corrective measures which should be aimed at protecting or saving cultural properties from works likely to damage or destroy them, such as urban expansion and renewal projects, injudicious repair and modifications, highway works, agricultural operations, the construction of infrastructure and industrial development.

Recommendations Concerning the Protection at National Level of the Cultural and Natural Heritage (1972). Defines the terms cultural and natural heritage, and provides a lengthy consideration of general principles, the organisation of services, and protective measures under the headings financial, administrative, scientific and technical.

Convention for the Protection of the World Cultural and Natural Heritage (1972). Introduced the concept of World Heritage Sites.

Recommendations Concerning the Safeguarding and Contemporary Role of Historic Areas (1976). Another lengthy and detailed document which provides a comprehensive set of standards and principles for the conservation of the historic environment.

The charters and standards should be viewed as providing guiding principles towards defining an appropriate response to particular conservation issues, not as instant and all-inclusive prescriptions. The following factors form the basis of most of the documents: comprehensive analysis of the place, minimum intervention in the historic fabric, precise documentation, respect for contributions from all periods, maintenance of authenticity and the requirement to take a holistic view of the historic environment.

SEARCH AGAIN FOR CULTURAL HERITAGE

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- **Links to Cultural Heritage Policy Documents**
- Other Conservation Websites

Cultural Heritage Policy Documents

At the end of the list you will find a roster of the international organizations principally responsible for these documents and links, where available, to their organizational Web sites.

The initial research for this section was undertaken for the Getty Conservation Institute by Erica Steele.

The following list is organized chronologically:

- 1877-1904
- 1930-39
- 1950-59
- 1960-69
- 1970-78
- 1980-89
- 1990-99
- 2000-

1877-1904

- The Principals of the Society for the Protection of Ancient Buildings as Set Forth upon its Foundation (The SPAB Manifesto) (1877)
- Recommendations of the Madrid Conference (1904)

1930-39

- General Conclusions of the Athens Conference (1931)
- Carta Di Atene (1931)
- Charter of Athens (1933)
- Roerich Pact: Protection of Artistic and Scientific Institutions and Historic Monuments (1935)

1950-59

- Hague Convention: Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)
- European Cultural Convention (1954)
- Recommendation on International Principles Applicable to Archaeological Excavation (1956)
- Recommendation Concerning International Competitions in Architecture and Town Planning (1956)

1960-69

- Recommendation Concerning the Most Effective Means of Rendering Museums Accessible to Everyone (1960)
- Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites (1962)
- The Venice Charter: International Charter for the Conservation and Restoration of Monuments and Sites (1964)
- Recommendation on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1964)
- Norms of Quito: Final Report of the Meeting on the Preservation and Utilization of Monuments and Sites of Artistic and Historical Value (1967)
- Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works (1968)
- European Convention on the Protection of the Archaeological Heritage (1969)

1970-78

- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)
- Convention Concerning the Protection of the World Cultural and Natural Heritage (1972)
- Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage (1972)
- Resolutions of the Symposium on the Introduction of Contemporary

Architecture into Ancient Groups of Buildings (1972)
- European Charter of the Architectural Heritage (1975)
- Declaration of Amsterdam (1975)
- Resolutions of the International Symposium on the Conservation of Smaller Historic Towns (1975)
- Cultural Tourism (1976)
- Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations, Convention of San Salvador (1976)
- Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas (1976)
- Recommendation Concerning the International Exchange of Cultural Property (1976)
- Recommendation for the Protection of Moveable Cultural Property (1978)

1980-89

- Recommendation for the Safeguarding and Preservation of Moving Images (1980)
- The Florence Charter: Historic Gardens (1982)
- Deschambault Charter for the Preservation of Quebec's Heritage (1982)
- Tlaxcala Declaration on the Revitalization of Small Settlements (1982)
- Declaration of Dresden (1982)
- Appleton Charter for the Protection and Enhancement of the Built Environment (1983)
- Declaration of Rome (1983)
- European Convention on Offences Relating to Cultural Property (1985)
- Convention for the Protection of the Architectural Heritage of Europe (1985)
- First Brazilian Seminar About the Preservation and Revitalization of Historic Centers (1987)
- The Washington Charter: Charter on the Conservation of Historic Towns and Urban Areas (1987)
- Recommendation on the Safeguarding of Traditional Culture and Folklore (1989)
- The Vermillion Accord on Archaeological Ethics and the Treatment of the Dead (1989)

1990-99

- Charter for the Protection and Management of the Archaeological Heritage (1990)
- Québec City Declaration (1991)
- Charter for the Conservation of Places of Cultural Heritage Value (1992)
- A Preservation Charter for the Historic Towns and Areas of the United States of America (1992)
- Charter of Courmayeur (1992)
- European Convention for the Protection of the Archaeological Heritage of Europe (Revised) (1992)
- New Orleans Charter for the Joint Preservation of Historic Structures and Artifacts (1992)
- Declaration of Rio (1992)
- Declaration of Oaxaca (1993)
- The Fez Charter (1993)
- Guidelines for Education and Training in the Conservation of Monuments, Ensembles and Sites (1993)
- UN General Assembly Resolution (A/RES/48/15) on the Return or Restitution of Cultural Property to the Countries of Origin (1993)
- Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage (1994)
- The Nara Document on Authenticity (1994)
- Resolution on Information as an Instrument for Protection against War Damages to the Cultural Heritage (1994)
- Unidroit Convention on Stolen or Illegally Exported Cultural Objects (1995)
- Bergen Protocol on Communications and Relations among Cities of the Organization of World Heritage Cities (1995)
- Charter for Sustainable Tourism (1995)
- Secretary of the Interior's Standards for the Treatment of Historic Properties (1995)
- Charter for the Protection and Management of the Underwater Cultural Heritage (1996)
- Final Communiqué of the NATO-Partnership for Peace Conference on Cultural Heritage Protection in Wartime and in State of Emergency (1996)
- Declaration of Valencia (1996)
- Declaration of San Antonio (1996)
- Declaration of Quebec (1997)
- Document of Pavia (1997)
- Evora Appeal (1997)

- The Stockholm Declaration : Declaration of ICOMOS marking the 50th anniversary of the Universal Declaration of Human Rights (1998)
- Declaration of Melbourne (1998)
- Recommendation on Measures to Promote the Integrated Conservation of Historic Complexes Composed of Immovable and Moveable Property (1998)
- The Burra Charter: The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance (1999)
- Charter on the Built Vernacular Heritage (1999)
- International Wood Committee Charter: Principles for the Preservation of Historic Timber Buildings (1999)
- International Cultural Tourism Charter: Managing Tourism at Places of Heritage Significance (1999)
- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999)

2000-

- Convention on Biological Diversity (2000)
- European Convention on Landscape (2000)
- Convention on the Protection of Underwater Cultural Heritage (2001)
- Convention for the Safeguarding of Intangible Cultural Heritage (2003)
- ICOMOS Charter on the Interpretation and Presentation of Cultural Heritage Sites (2007)
- ICOMOS Charter on Cultural Routes (2008)

References

For more information on international cultural policy and legislation, please consult the following.

Phelan, Marilyn, Gary Edson and Kimberly P. Mayfield, eds. *The Law of Cultural Property and Natural Heritage: Protection, Transfer, and Access* (Evanston, Ill.: Kalos Kapp Press, 1998).
This document contains reference to a limited number of national charters and conventions for the protection of cultural heritage.

Burnham, Bonnie, ed. *The Protection of Cultural Property, Handbook of National Legislations*. (Paris: International Council of Museums, 1974).

Saba, Hanná and Nabil G. Salamé, eds. *The Protection of Movable Cultural Property, Compendium of Legislative Texts, Volumes I and II* (Paris: UNESCO, 1984). Translation of *Protection du patrimoine culturel mobilier*.
These resources contain information on the national legislation of other countries.

The Web sites of these organizations can provide background information. The starred entries also provide many full-text versions of the cultural heritage policy documents.

*Council of Europe
ICOM (International Council of Museums)
*ICOMOS (International Council on Sites and Monuments)
ICAHM (International Committee on Archaeological Heritage Management (a committee of ICOMOS)
IFLA (International Federation of Library Associations and Institutions)
OWHC (Organization of World Heritage Cities)
*UNESCO (United National Education, Scientific and Cultural Organization)
WMF (World Monuments Fund)

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Photo: Dennis Keeley

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Photo: Dennis Keeley

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Other Conservation Websites

- American Academy in Rome
- American Institute for Conservation of Historic and Artistic Works (AIC)
- Art Conservation Department at the University of Delaware
- Asian Academy for Heritage Management (a joint program of UNESCO and ICCROM)
- Atelier de Restauration et de Conservation des Photographies de la Ville de Paris
- Australian Institute for the Conservation of Cultural Materials (AICCM)
- Bay Area Art Conservation Guild
- Buffalo State College Art Conservation Department
- Canadian Association for Conservation of Cultural Property
- Canadian Association of Professional Conservators
- Canadian Conservation Institute (CCI)
- Canadian Heritage Information Network Home Page (CHIN)
- Centre de conservation Québec
- CHAMP (Collaborative for Cultural Heritage Management and Policy) University of Illinois, Urbana-Champaign
- Conservation Center for Art & Historic Artifacts
- Conservation Center, Institute of Fine Arts, New York University
- Conservation Information Network (BCIN)
- Conservation OnLine (CoOL)
- Courtauld Institute of Art
- CRM, Cultural Resource Management
- Djenné Patrimoine
- English Heritage
- European Confederation of Conservator-Restorers' Organizations (ECCO)
- Heritage, Culture and Museum Studies Program (University of Victoria, Canada)
- Heritage Preservation (Formerly the National Institute for Conservation, NIC)
- Historic New England
- Historic Preservation, Graduate School of Fine Arts, University of Pennsylvania
- Information Network (RIO) of the Organization of World Heritage Cities (OWHC)

- Institute of Conservation (ICON)
- International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM)
- International Committee for Conservation (ICOM-CC)
- International Council on Monuments and Sites (ICOMOS)
- International Council of Museums (ICOM)
- International Institute for Conservation of Historic and Artistic Works (IIC)
- Journal of Conservation and Museum Studies
- Library of Congress Preservation
- Los Angeles Conservancy
- Masonry Conservation Research Group (MCRG), Robert Gordon University
- METALConsn-info
- Museum Conservation Institute (formerly SCMRE of the Smithsonian Institution)
- National Center for Preservation Technology and Training (NCPTT)
- National Preservation Institute (NPI)
- National Trust for Historic Preservation
- Netherlands Institute for Cultural Heritage
- Preserve/Net
- Preserving Access to Digital Information (PADI)
- Queen's University at Kingston Art Conservation Program
- Simple Book Repair Manual, Dartmouth College Library
- Society for the Preservation of Natural History Collections (SPNHC)
- Straus Center for Conservation and Technical Studies, Harvard Art Museums
- UNEP World Conservation Monitoring Centre
- United Nations Educational, Scientific and Cultural Organization (UNESCO)
- World Heritage (a program of UNESCO)
- World Monuments Fund (WMF)

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Cultural Heritage Policy Documents

The SPAB Manifesto: The Principals of the Society for the Protection of Ancient Buildings as Set Forth upon its Foundation (1877)

Society for the Protection of Ancient Buildings

Written by William Morris and other founder members of the Society, this manifesto holds up the ideal of restoration of ancient buildings as "protecting our ancient buildings, and hand[ing] them down instructive and venerable to those that come after us." Most of the manifesto is devoted to attacking thoughtless and destructive efforts of restoration that leave the building a "feeble and lifeless forgery." The manifesto recommends protection rather than restoration as well as resisting tampering with the fabric or ornament of the building as it stands, advocating "staving off decay by daily care."

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Recommendations of the Madrid Conference (1904)

Sixth International Congress of Architects

These brief Recommendations constitute an early attempt to set down principles of architectural conservation. The recommendations emphasize the importance of minimal intervention in dealing with ruined structures and of finding a functional use for historic buildings. The document sets forth the principle of unity of style, which encourages restoration according to a single stylistic expression.

This is a retyped version of a journal document entitled The Sixth International Congress of Architects, 1904, Madrid. It is a report of the Secretary of the Institute. W.J. Locke. It is included here for educational reference purposes only. The Getty suggests that when referencing this document, the original document should be consulted (see citation below).

The formatting, to the best of our abilities, have remained intact and any original typographical errors noted, but otherwise have been left unchanged.

Full Bibliographic Information:

The Architectural Journal
Being the Journal of the Royal Institute of British Architects (RIBA) Vol. XI. Third Series, 1904. pp. 343-346.

Report of the Secretary of the Institute.

To the President and Council.

GENTLEMEN, —I have the honour to report that, in accordance with your appointment, Mr. T.E. Colleutt, *Vice-President*, and myself attended the Sixth International Congress of Architects held at Madrid during the early part of the present month as official delegates of the Royal Institute of British Architects. Mr. Cutler, your other delegate, was unfortunately unable through illness to attend. The other British members of the congress were Mr. Wm. Henman [F.], Mr. R. Clarke Edwards [F.], Mr. Wm. Scott (Enniskillen), and Mr. J. Thompson (Tangier).

The official date fixed for the beginning of the proceedings was Wednesday the 6th April, but owing to a change in the engagements of His Majesty the King of Spain the delegates of the various countries were requested by telegram to warn their colleagues that the proceedings would begin on Monday the 4th inst. Mr. Henman, Mr. Scott, and myself arrived accordingly in Madrid on Sunday afternoon.

Monday, 4th April.—In the morning I reported myself at the Atheneo, the large literary and artistic club of Madrid, whose convenient offices and beautifully appointed lecture-hall had been given over to the Congress as headquarters. There I obtained the Congress button, a piece of Toledo inlay, tickets for the two excursions and the farewell banquet, and a card of invitation to the King's reception.

The reception took place at the Palace at 3 o'clock. Members of the Congress, with the ladies that accompanied them, were distributed according to nationalities in a suite of rooms leading from the Throne-room to the State Dining-room. The English, American, and Dutch were placed in three groups in one apartment. In due course His Majesty Alfonso XIII, appeared accompanied by the President and Secretary of the Congress and the officers of his Court. The foreign delegates were honoured by presentation to the King, who shook hands and entered into a short conversation with each individually. I had the honour of being addressed by His Majesty in English. After the King had passed out, Her Majesty the Queen-Mother, the Infanta Isabella, the Infanta Maria Theresa (the King's sister) and her husband, the Prince of the Asturias, entered, and each in turn graciously conversed with the delegates and other members on presentation. All the members of the royal family spoke in English to the British and American representatives. After the proceedings were over the company were invited to wander about the State apartments and inspect the art treasures with which they were filled.

Tuesday, 5th—The morning was devoted to the opening by Their Majesties of an exhibition of the monumental art of Spain. This was held in a pavilion with glass and iron roof, which formed part of the buildings of a previous exhibition, picturesquely situated in the middle of the Retiro, the public park of Madrid. Their Majesties and the other members of the royal family were received by Señor Don Ricardo Velázquez Bosco,

President of the Congress, and the other members of the Spanish Executive committee, and, after the presentation of such foreign delegates as had not arrived at Madrid in time for the reception of the previous day, were conducted round the exhibition. Before the royal personages left they conversed with various members of the Congress who had been presented.

The exhibition itself consisted of a magnificent series of photographs, which gave, as one went round the walls, an almost complete history of Spanish architecture; many original drawings of old buildings, notably the designs of the Italian Saqueti for the royal palace 1742; various models, including one of the Segovia aqueduct; and casts of ornament, chiefly Moorish.

Wednesday, 6th.—The Congress proper began in the morning with the preparatory sitting. After the preliminary speeches the *Bureau* or managing committee of the Congress was constituted as follows:

President.
Señor Velásquez Bosco

Vice-Presidents.
Señores Urioste, Repullés, Arbós, Landescho, Palacio.

General Secretary.
Señor Cabllo y Lapiedra.

Hon. Vice-Presidents.
Germany: M. Muthesius and M. Stübben.
Austria: M. Herman Helmer.
Belgium: M. Franze de Vestel.
United States: MM. Allen, Russell, Taylor, Totten, Ittner.
France: M. Daument.
Holland: M. Cuypers.
Great Britain: M. Colleutt.
Italy: M. Koch
Portugal: M. d'Avila.
Russia: M. le Comte de Suzor.
Sweden: M. Möller.
Mexico: M. Riva Mercado.

Hon. Secretaries.
Austria: M. Weber.
United States: MM.W. Eames, Glenn Brown.
France: M. Poupinel
Holland: M. Salm.
Italy: M. Cannizzaro.
Great Britain: M. Locke
Mexico: M. Mariscal.
Portugal: M. Carvalheira Adaes Bermudes.
Sweden: M. Wickman.
Switzerland: M.Fulpius

In the afternoon at 3 o'clock the formal opening of the Congress took place in the hall of the University, the Minister of Public Instruction presiding, and supported by the Minister of Public Works, the Civil Governor, the Mayor of Madrid, and members of the diplomatic body. About 2,000 persons were present. The proceedings were formal and oratorical. After a discourse by the President on Spanish architecture and its relation with that of other countries, terminating with a cordial welcome to the foreign members of the Congress, the representative of each nation briefly addressed the gathering, Mr. Collcutt speaking on behalf of Great Britain. The Minister of Public Instruction in the name of H.M. the King then declared the Congress open.

Thursday, 7th.—The sitting opened with the consideration of Subject I.:--"The so-called 'Modern Art' in contemporary Architecture."

M. de Vestel, President of the Société Centrale des Architectes de Belgique, read an interesting Paper in which he defended the freedom of Art, especially in architecture, which must be characterized by a personality and not fall into stereotyped grooves. He established the difference between "modern style" and "modern art" which follows all the vicissitudes or changes of Society.

M. Muthesius (Germany) read a Paper showing the influence of modern methods of scientific construction, and claiming that modern architecture could have rational development only through the close union between the architect and the engineer.

The subject being talked out, Subject II. was brought forward: "The Preservation and Restoration of Architectural Monuments."

A Paper by M. Coquet (Belgium) was taken as read, and various propositions laid down by him were discussed until the sitting terminated. At the afternoon sitting the discussion was resumed, and finally the following resolutions were adopted:

1. Monuments may be divided into two classes, *dead monuments*, i.e. those belonging to a past civilisation or serving obsolete purposes, and *living*

monuments, i.e. those which continue to serve the purposes for which they were originally intended.

2. Dead monuments should be preserved only by such strengthening as is indispensable in order to prevent their falling into ruin; for the importance of such a monument consists in its historical and technical value, which disappears with the monument itself.

3. Living monuments ought to be *restored* so that they may continue to be of use, for in architecture utility is one of the bases of beauty.

4. Such restoration should be effected in the original style of the monument, so that it may preserve its unity, unity of style being also one of the bases of beauty in architecture, and primitive geometrical forms being perfectly reproducible. Portions executed in a different style from that of the whole should be respected, if this style has intrinsic merit and does not destroy the aesthetic balance of the monument.

5. The preservation and restoration of monuments should be entrusted only to architects "diplômés par le Gouvernemnet," or specially authorised and acting under the artistic, archaelogical, and technical control of the State.

6. A society for the preservation of historical and artistic monuments should be established in every country. They might be grouped for common effort and collaborate in the compilation of a general inventory of national and local treasures.

Subject III. was then taken: "The Character and Scope of Scientific Studies in the General Teaching of Architecture."

A paper was read in Spanish by Señor Fernandez Casanova, and the meeting was adjourned till Saturday.

After the sitting, members were invited by the architect Don José Grases Riera to inspect the monument to King Alfonso XII, in course of erection in the Park of Madrid.

An illustration of the monument as it will be when completed is given opposite.

Friday, 8th.—The day was devoted to a visit to Toledo. The Civil Governor and the Mayor welcomed the Congressists at the railway station. Various Spanish architects attached themselves to small groups of foreign members and conducted them through the Cathedral and to the objects of interest in the town. Mr. Clarke Edwards and myself are particularly indebted to the great courtesy of Señor Acerbo y Retorillo, who placed all his intimate knowledge of Toledo at our service, and spared himself no pains to render our visit delightful. Lunch was served in the little Teatro de Rojas, the floor being boarded up to a level with the stage. The band of the Military Academy played in the balcony, and the boxes and galleries were crowded with all ranks of Toledo society, a gay battle of flowers between Congressists and spectators taking place all through the meal. The bandmaster, after playing a *jota* - one of the Spanish national dances - received a floral ovation, and delightfully played the piece again. In its unexpectedness and spontaneity, this lunch was one of the most pleasurable and certainly the quaintest incident in the Congress.

Saturday, 9th.—At the morning sitting of the Congress the educational subject was resumed. Señor Mariscal (Mexico) and Señor Puig y Cadalfach (Barcelona) read papers. The discussion eventually became a contest between the advocates of the scientific and those of the artistic oraesthetic training of the architect. M. Guadet, Professor at the Ecole des Beaux-Arts of Paris, upheld the French atelier system by which the pupil becomes the real disciple of the master and develops by means of intimate personal contact the artistic sense, which is the beginning and end of the architect. Eventually it was resolved that the *bureau* of the Congress should formulate the conclusions that might be deduced from the various arguments.

The same decision was arrived at with regard to Subject IV. - "The Influence of Modern Methods of Construction on Artistic Forms."

M. Berlage (Amsterdam) read a Paper on armoured concrete, proclaiming it to be the determining cause in the evolution of future architecture, and urging architects to study artistic forms in their present use of it if they desire to remain masters of their art.

eñores Forte and Jalvo (Madrid) and M. Cuypers (Amsterdam) read papers, and the synopsis of a paper by M. Guastavino (New York) was placed before the meeting. The discussion lasted until late in the afternoon sitting. A paper, Subject V., "Artistic Copyright in Architectural Works," read by Señor Salvat (Barcelona), brought the proceedings to a close.

In the evening M. Cannizzaro (Rome) gave a lecture, illustrated by lantern slides, on the excavations executed under his care of the Church of S. Sabba, and on the *Ara Pacis Augusta*.

I greatly regret that on the following day personal affairs summoned me imperatively back to London. Being by this time the only English representative at Madrid, I was in some embarrassment, which was relieved, however, by the timely arrival at my hotel of Mr. A. N. Prentice [F.], who, though not intending to join the Congress, very kindly undertook to stay in Madrid and take my place on the *bureau.* The subsequent notes of the proceedings are from material which he has since been good enough to supply.

Monday, 11th—The subject of architectural copyright was resumed. M. Cabello y Lapiedra's Paper having been laid on the table, M. Harmand, advocate at the Cour d'Appel, Paris, who has identified himself with the question in France, and succeeded in 1902 in obtaining the insertions of architectural works in French copyright Law, moved the following resolutions, which were carried unanimously:

"That seeing:

> "1. That architectural designs comprise exterior and interior perspectives, plans, sections, and elevations, and constitute the first manifestation of the thought of the architect and the work of the architect;
>
> "2. That the building is only a reproduction on the ground of the architectural designs; "works of architecture should be protected in all legislatures and in all international conventions in the same degree as other artistic works."

Subject VI. came on for discussion—"*The Education of Builders/ Workmen."*

The following conclusions were arrived at:

> 1. Governments, municipalities, and professional bodies should pay particular attention to the technical education of the workman.
>
> 2. The teaching should extend to all branches of building, and not be confined to specialties, more or less artistic, for the study of which schools already exist.
>
> 3. The teaching in these schools should have as practical a character as possible, so that the teaching should produce good workmen.
>
> 4. The direction of these schools should be entrusted *entirely* to architects, and the teaching carried out by technical specialists and experienced master workmen.
>
> 5. These schools should issue *certificates* of having passed through the course, and not *diplomas*, which might give rise to false interpretation.
>
> 6. Supplementary classes should be established so that workmen after having worked for at least three years as journeymen might by further studies acquire the title of foremen.
>
> 7. Architectural societies should encourage workmen by prizes, medals, and other rewards.

The meeting passed on to Subject VII.—"*The Influence of Administrative Regulations on Contemporary Architecture."*

The conclusions were left to be drawn up by the *bureau.*

Subject VIII.—"*The Expropriation of Works of Architectural Art*"—produced the following resolution:

"The State has the right to expropriate any work of artistic or recognised historic value when in the hands of the owner it is being destroyed or not duly preserved, always provided that an indemnity fixed by competent persons be paid to the owner."

Subject IX.—"*Is it desirable that the Architect should intervene as Arbitrator in the relations between Patrons and Workmen and in the Disputes that arise between them?"*

A resolution was passed answering the question in the affirmative.

A supplementary resolution, proposed by Señor Acebo (Madrid), not down on the agenda of the Congress, was then carried in these terms:

"That foreign delegates and the Executive Committee of the Congress solicit from their respective governments the mutual and gratuitous cession of reproductions of details or

not very extensive complete works which, corresponding to different epochs of national art, may become the property of the State museums, on the express condition that such reproductions shall be applied to the formation of architectural museums in towns in which architectural education is given either in special schools or officially authorised private *ateliers."*

Tuesday, 12th.—The day was devoted to an excursion to Alcalá and Guadalajara.

Wednesday, 13th.—At the meeting of the *bureau* the application contained in the letter dated 29th March from the Council of the R.I.B.A. was considered, and it was resolved that the next International Congress should take place in London. As four years had elapsed between the Fifth Congress in Paris and the Sixth Congress in Madrid, it was determined, in order to preserve the triennial character of the congress, that the Seventh should take place two years hence, in 1906 and not in 1907, as the Council of the Royal Institute suggested. The formal communication from the *bureau* will no doubt arrive in due course. In the evening the farewell banquet took place.

I cannot conclude without a reference to the enjoyability and great interest of the Congress. We were favoured by the weather of a splendid English June. The courtesy of our Spanish hosts will always be a pleasant memory in the minds of all the foreign representatives. It is impossible to conceive a more perfect organisation. Information was lavishly supplied; in every fixture the strictest punctuality was observed; one had only to follow printed announcements and the way of every member of the Congress was smooth. Too much praise cannot be given to the Executive Committee; and the thanks of the foreign members are particularly due to the President, Señor Don Velázquez Bosco, and the Secretary, Señor Don Cabello y Lapiedra, whose labours in assuring the success of the Congress were indefatigable.

I am, Gentlemen,

Your obedient servant,

W. J. LOCKE, *Secretary.*

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General Conclusions of the Athens Conference (1931)

First International Congress of Architects and Technicians of Historic Monuments

These Conclusions were drafted at the end of a conference on the restoration of historic monuments and buildings held in Athens in 1931. This document introduced important conservation concepts and principles:

- the idea of a common world heritage;
- the importance of the setting of monuments; and
- the principle of integration of new materials.

The Conclusions were ahead of their time in calling for the reburial of archaeological remains when conservation cannot be guaranteed.

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Carta Di Atene (1931)

Advisory Council for Antiquities and Fine Arts

The principles set forth in the Carta del Restauro reflect Italian conservation theory and practice. They were established by the Advisory Council for Antiquities and Fine Arts in 1931 to guide restoration work carried out by private and public agencies in Italy. This document and Italian restoration theory were major sources of ideas expressed in the Venice Charter.

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Charter of Athens (1933)

IV International Congress for Modern Architecture

This document was produced as a result of the IV International Congress of Modern Architecture which took as its theme "the functional city" and focused on urbanism and the importance of planning in urban development schemes. The document includes urban ensembles in the definition of the built heritage and emphasizes the spiritual, cultural and economic value of the architectural heritage. It includes a recommendation calling for the destruction of urban slums and creation of "verdant areas" in their place, denying any potential heritage value of such areas. It condemns the use of pastiche for new construction in historic areas.

This is a retyped version of a translated document entitled The Athens Charter, 1933. J.Tyrwitt created the translation from French to English in 1943; the translation was thereafter published by Harvard University's Library of the Graduate School of design. It is included here for educational reference purposes only. The Getty suggests that when referencing this document, the original document should be consulted (see citation below).

The formatting, to the best of our abilities, have remained intact and any original typographical errors noted, but otherwise have been left unchanged.

Full Bibliographic Information:
Congress Internationaux d'Architecture moderne (CIAM), La Charte d'Athenes or The Athens Charter, 1933. Trans J.Tyrwhitt. Paris, France: The Library of the Graduate School of Design, Harvard University, 1946.

HARVARD UNIVERSITY

THE LIBRARY OF THE GRADUATE SCHOOL OF DESIGN

THE ATHENS CHARTER, 1933

Translated by J. Tyrwhitt

from La Charte d'Athenes Paris, 1943

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I. THE CITY IN ITS REGIONAL SETTING

1. The city is only a part of the economic, social and political entity which constitutes the region.
2. Economic, social and political values are juxtaposed with the psychological and physiological attributes of the human being, raising problems of the relations between the individual and the community. Life can only expand to the extent that accord is reached between these two opposing forces: the individual and the community.
3. Psychological and biological constants are influenced by the environment: its geographic and topographic situation as well as its economic and political situation. The geographic and topographic situation is of prime importance, and includes natural elements, land and water, flora, soil, climate, etc.
4. Next comes the economic situation, including the resources of the region and natural or manmade means of communication with the outside world.
5. Thirdly comes the political situation and the system of government and administration.
6. Special circumstances have, throughout history, determined the character of individual cities: military defense, scientific discoveries, different administrations, the progressive development of communications and methods of transportation (road, water, rail, air).
7. The factors which govern the development of cities are thus subject to continual change.

8. The advent of the machine age has caused immense disturbances to man's habits, place of dwelling and type of work; an uncontrolled concentration in cities, caused by mechanical transportation, has resulted in brutal and universal changes without precendent [sic] in history. Chaos has entered into the cities.

II. THE FOUR FUNCTIONS OF THE CITY

A. Dwelling

9. The population density is too great in the historic, central districts of cities as well as in some nineteenth century areas of expansion: densities rise to 1000 and even 1500 inhabitants per hectare (approximately 400 to 600 per acre).
10. In the congested urban areas housing conditions are unhealthy due to insufficient space within the dwelling, absence of useable green spaces and neglected maintenance of the buildings (exploitation based on speculation). This situation is aggravated by the presence of a population with a very low standard of living, incapable of initiating ameliorations (mortality up to 20 per cent).
11. Extensions of the city devour, bit by bit, its surrounding green areas; one can discern the successive rings of development. This ever greater separation from natural elements heightens the harmful effects of bad sanitary conditions.
12. Dwellings are scattered throughout the city without consideration of sanitary requirements.
13. The most densely populated districts are in the least favorable situations (on unfavorable slopes, invaded by fog or industrial emanations, subject to flooding, etc.)
14. Low indensity developments (middle income dwellings) occupy the advantageous sites, sheltered from unfavorable winds, with secure views opening onto an agreeable countryside, lake, sea, or mountains, etc. and with ample air and sunlight.
15. This segregation of dwellings is sanctioned by custom, and by a system of local authority regulations considered quite justifiable: zoning.
16. Buildings constructed alongside major routes and around crossroads are unsuitable for dwellings because of noise, dust and noxious gases.
17. The traditional alignment of houses along the sides of roads means that good exposure to sunlight is only possible for a minimum number of dwellings.
18. The distribution of community services related to housing is arbitrary.
19. Schools, in particular, are frequently sited on busy traffic routes and too far from the houses they serve.
20. Suburbs have developed without plans and without well organized links with the city.
21. Attempts have been made too late to incorporate suburbs within the administrative unit of the city.
22. Suburbs are often merely an agglomeration of hutments where it is difficult to collect funds for the necessary roads and services.

IT IS RECOMMENDED

23. Residential areas should occupy the best places in the city from the point of view of typography, climate, sunlight and availability of green space.
24. The selection of residential zones should be determined on grounds of health.
25. Reasonable densities should be imposed related both to the type of housing and to the conditions of the site.
26. A minimum number of hours of sunlight should be required for each dwelling unit.
27. The alignment of housing along main traffic routes should be forbidden [sic]
28. Full use should be made of modern building techniques in constructing highrise apartments.
29. Highrise apartments placed at wide distances apart liberate ground for large open spaces.

B. Recreation

30. Open spaces are generally insufficient.
31. When there is sufficient open space it is often badly distributed and, therefore not readily usable by most of the population.
32. Outlying open spaces cannot ameliorate areas of downtown congestion.
33. The few sports fields, for reasons of accessibility, usually occupy sites earmarked for future development for housing or industry: which makes for a precarious existance [sic] and their frequent displacement.
34. Land that could be used for week-end leisure is often very difficult of access [sic].

IT IS RECOMMENDED

35. All residential areas should be provided with sufficient open space to meet reasonable needs for recreation and active sports for children, adolescents and adults.
36. Unsanitary slums should be demolished and replaced by open space. This would ameliorate the surrounding areas.
37. The new open spaces should be used for well-defined purposes: children's playgrounds, schools, youth clubs and other community buildings closely related to housing.
38. It should be possible to spend week-end free time in accessible and favorable places.
39. These should be laid out as public parks, forests, sports grounds, stadiums, beaches, etc.
40. Full advantages should be taken of existing natural features: rivers, forests, hills, mountains, valleys, lakes, sea, etc.

C. Work

41. Places of work are no longer rationally distributed within the urban complex. This comprises industry, workshops, offices, government and commerce.
42. Connections between dwelling and place of work are no longer reasonable: they impose excessively long journeys to work.
43. The time spent in journeying to work has reached a critical situation.
44. In the absence of planning programs, the uncontrolled growth of cities, lack of foresight, land speculation, etc. have caused industry to settle haphazardly, following no rule.
45. Office buildings are concentrated in the downtown business district which, as the most privileged part of the city, served by the most complete system of communications, readily falls prey to speculation. Since offices are private concerns effective planning for their best development is difficult.

IT IS RECOMMENDED

46. Distances between work places and dwelling places should be reduced to a minimum.
47. Industrial sectors should be separated from residential sectors by an area of green open space.
48. Industrial zones should be contiguous with railroads, canals and highways.
49. Workshops, which are intimately related to urban life, and indeed derive from it, should occupy well designed [sic] areas in the interior of the city.
50. Business districts devoted to administration both public and private, should be assured of good communications with residential areas as well as with industries and workshops within the city and upon its fringes.

D. Transportation

51. The existing network of urban communications has arisen from an agglomeration of the aids [sic] roads of major traffic routes. In Europe these major routes date back well into the middle ages [sic], sometimes even into antiquity.
52. Devised for the use of pedestrians and horse drawn vehicles, they are inadequate for today's mechanized transportation.
53. These inappropriate street dimensions prevent the effective use of mechanized vehicles at speeds corresponding to urban pressure.
54. Distances between crossroads are too infrequent.
55. Street widths are insufficient. Their widening is difficult and often ineffectual.
56. Faced by the needs of high speed [sic] vehicles, present the apparently irrational street pattern lacks efficiency and flexibility, differentiation and order [sic].
57. Relics of a former pompous magnificence designed for special monumental effects often complicate traffic circulation.
58. In many cases the railroad system presents a serious obstacle to well planned urban development. It barricades off certain residential districts, depriving them from easy contact with the most vital elements of the city.

IT IS RECOMMENDED THAT

59. Traffic analyses be made, based on accurate statistics, to show the general pattern of circulation in the city and its region, and reveal the location of heavily travelled [sic] routes and the types of their traffic.
60. Transportation routes should be classified according to their nature, and be designed to meet the rrquirements [sic] and speeds of specific types of vehicles.
61. Heavily used traffic junctions should be designed for continuous passage of vehicles, using different levels.
62. Pedestrian routes and automobile routes should follow separate paths.
63. Roads should be differentiated according to their functions: residential streets, promenades, through roads, major highways, etc.
64. In principle, heavy traffic routes should be insulated by green belts.

E. Legacy of History

IT IS RECOMMENDED THAT:

65. Fine architecture, whether individual buildings or groups of buildings, should be protected from demolition.
66. The grounds for the preservation of buildings should be that they express an earlier culture and that their retention is in the public interest.
67. But their preservation should no [sic] entail that people are obliged to live in unsalubrius [sic] conditions.
68. If their present location obstructs development, radical measures may be called for, such as altering major circulation routes or even shifting existing central districts - something usually considered impossible.
69. The demolition of slums surrounding historic monuments provides an opportunity to create new open spaces.
70. The re-use of past styles of building for new structures in historic areas under the pretext of assthetics [sic] has disastrous consequences. The continuance or the introduction of such habits in any form should not be tolerated.

III. CONCLUSIONS

71. Most of the cities studied present an image of chaos. They do not correspond in any way to their ultimate purpose: to satisfy the basic biological and physiological needs of their inhabitants.

72. The irresponsibility of private enterprise has resulted in a disastrous rupture of the equilibrium between strong economic forces on one side and, on the other, weak administrative controls and powerless social interests.
73. Although cities are constantly changing, their development proceeds without order or control and with no attempt to apply contemporary town planning principles, such as have been specified in professionally qualified circles.
74. The city should assure both individual liberty and the benefits of collective action on both the spiritual and material planes.
75. The dimensions of everything wi thin [sic] the urban domain should relate to the human scale.
76. The four keys to urban planning are the four functions of the city: dwelling, work, recreation (use of leisure time), transportation.
77. The city plan sould [sic] determine the internal structure and the interrelated positions in the city of each sector of the four key functions.
78. The plan should ensure that the daily cycle of activities between the dwelling, workplace and recreation (recuperation) can occur with the utmost economy of time. The dwelling should be considered as the prime center of all urban planning, to which all other functions are attached.
79. The speeds of mechanized transportation have disrupted the urban setting, presenting an ever-present danger, obstructing or paralyzing communications and endangering health.
80. The principle of urban and suburban circulation must be revised. A classification of acceptable speeds must be established. A reformed type of zoning must be set up that can bring the key functions of the city into a harmonious relationship and develop connections between them. These connections can then be developed into a rational network of major highways.
81. Town planning is a science based on three dimensions, not on two. This introduces the element of height which offers the possibility of freeing spaces for modern traffic circulation and for recreational purposes.
82. The city should be examined in the context of its region of influence. A plan for the total economic unit - the city-region - must replace the simple master plan of a city.
83. The city should be able to grow harmoniously as a functioning urban unity in all its different parts, by means of preordained open spaces and connecting links, but a state of equilibrium should exist at every stage of its development.
84. It is urgently necessary for every city to prepare a planning program indicating what laws will be needed to bring the plan to realization.
85. The planning program must be based on rigorous analytical studies carried out by specialists. It must foresee its stages of development in time andspace [sic]. It must coordinate the natural resources of the site, its topographic advantages, its economic assets, its social needs and its spiritual aspirations.
86. The architect engaged in town planning should determine everything in accordance with the human scale.
87. The point of departure for all town planning should be the single dwelling, or cell, and its grouping into neighborhood units of suitable size.
88. With these neighborhood units as the basis, the urban complex can be designed to bring out the relations between dwelling, places of work and places devoted to recreation.
89. The full resources of modern technology are needed to carry out this tremendous task. This means obtaining the cooperation of specialists to enrich the art of building by the incorporation of scientific innovations.
90. The progress of these developments will be greatly influenced by political, social and economic factors. . . [sic]
91. And not, in the last resort, by questions of architecture.
92. The magnitude of the urgent task of renovating the cities, and the excessive subdivision of urban land ownerships present two antagonistic realities.
93. This sharp contradiction poses one of the most serious problems of our time: the pressing need to regulate the disposition of land on an equitable and legal basis, so as to meet the vital needs of the community as well as those of the individual.
94. Private interests should be subordinated to the interests of the community.

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Roerich Pact: Protection of Artistic and Scientific Institutions and Historic Monuments (1935)

Roerich Museum (U.S.) and Governments of American States

This document enacts a resolution approved at the Seventh International Conference of American States in 1933. The pact recommends the universal adoption of a flag to protect immovable monuments - both public and private - in times of danger. The pact affirms that monuments, museums, scientific, artistic, educational, and cultural institutions and their personnel are to be considered neutral in times of war unless put to military use. Likewise, they are to be accorded respect and protection in peacetime. The treaty proposes a distinctive flag to identify protected monuments and institutions. The design of the flag consists of a red circle on a white background. Inside the circle are three red spheres.

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Hague Convention: Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)

United Nations Educational, Scientific and Cultural Organization (UNESCO)

The Convention seeks to ensure that cultural property, both movable and immovable, is safeguarded and respected as the common heritage of humankind. The Convention encourages parties to prevent theft and vandalism of cultural property and proposes a distinctive blue and white shield-shaped emblem to identify protected cultural property. As with the Roerich Pact, cultural property and cultural institutions are to be protected in armed conflicts between States or between parties of the same State as long as they are not put to military purposes. Special protection is to be given to those properties that are listed on the "International Register of Cultural Property under Special Protection".

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European Cultural Convention (1954)

Council of Europe

The Convention promotes cooperation among European nations in order safeguard cultural property as well as to study and promote European civilization. The cultural property of the parties to the Convention is regarded as part of the common cultural heritage of Europe. The Convention emphasizes the nation as protector of the heritage not only for its own people but also for the wider community. The Convention encourages exchanges of persons and cultural objects and promotes access to cultural resources. States that are not members of the Council of Europe can participate in the Convention.

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Recommendation on International Principles Applicable to Archaeological Excavation (1956)

UNESCO

This document, adopted by the General Conference of UNESCO in 1956, establishes international principles governing the protection and excavation of archaeological sites. The document recommends that member states:

- make all archaeological exploration and excavation subject to prior authorization;
- make security, maintenance and conservation of the site and its associated objects part of the deed of concession to excavate;
- require any person who discovers archaeological remains to declare them to a competent authority;
- establish a state archaeological administration to document activity and finds;
- undertake educational efforts to promote respect for remains of the past;
- supervise the restoration of archaeological remains; and
- prohibit the removal of monuments without consent.

The Recommendation is not legally binding, but often has served as a model for national legislation governing excavation.

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Recommendation Concerning International Competitions in Architecture and Town Planning (1956)

UNESCO

The Recommendation, adopted by the General Conference of UNESCO, establishes the principles by which international design competitions are to be conducted. It provides guidelines for announcing competitions, inviting competitors, exhibiting plans, and awarding prizes. The Recommendations also cover copyright concerns, the composition of juries, and assistance by the International Union of Architects. The Recommendation makes no direct reference to historic sites and their conservation.

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Recommendation Concerning the Most Effective Means of Rendering Museums Accessible to Everyone (1960)

UNESCO

This Recommendation focuses on museum education and access for the public, particularly for school children and working people. It calls on museums to serve as intellectual and cultural centers and makes recommendations regarding the physical and intellectual accessibility of museums, including hours of operation, admission charges, and interpretation of material for the visiting public. The document recommends cooperation with schools and other educational organizations and the creation of education departments within the institutional structure to further the educational mission of the museum.

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Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites (1962)

UNESCO

This Recommendation, intended to supplement existing measures for the protection of nature, recognizes the important aesthetic, cultural, spiritual and scientific value of landscapes and the threat of poorly regulated development. It addresses natural and manmade landscapes and sites, including urban landscapes threatened by development and particularly areas that surround monuments. It encourages the use of both preventive and corrective measures and emphasizes the importance of urban and rural planning and oversight in safeguarding landscapes from infrastructure development, deforestation, pollution, advertising, building design and other named threats. The document recommends educational action (both in and out of schools) to raise public awareness of and respect for landscapes and sites. It emphasizes the importance of teacher training, involvement of the media, and state support for educational activities.

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The Venice Charter: International Charter for the Conservation and Restoration of Monuments and Sites (1964)

International Council on Monuments and Sites (ICOMOS), Second International Congress of Architects and Technicians of Historic Buildings

The Venice Charter codifies internationally accepted standards of conservation practice relating to architecture and sites. It sets forth principles of conservation based on the concept of authenticity and the importance of maintaining the historical and physical context of a site or building. The Venice Charter continues to be the most influential international conservation document. The Venice Charter states that monuments are to be conserved not only as works of art but also as historical evidence. It also sets down the principles of preservation, which relate to restoration of buildings with work from different periods.

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Recommendation on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1964)

UNESCO

The Recommendation proposes that member states draw up national inventories of cultural property, both publicly and privately held. It recommends establishing national services to protect against illegal export of cultural property and developing a certification process to authorize exports.

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Norms of Quito: Final Report of the Meeting on the Preservation and Utilization of Monuments and Sites of Artistic and Historical Value (1967)

ICOMOS

This document recognizes the abundance of monuments and sites that make up the cultural heritage of the Americas and addresses important conservation issues, such as:

- environmental impact of accelerated development,
- preserving historic districts and integrating them into urban areas,
- reconciling the conflicting demands of urban growth and environmental protection,
- the economic value of heritage, and
- cultural tourism.

The document calls for enhancing the utility and value of the cultural heritage. It includes recommendations for action at the national and regional levels. It also proposes technical and legal measures to preserve monuments and sites, including establishing protective zones and tax exemptions for privately restored historic buildings. Concern for the cultural heritage is raised in the context of development and urban growth issues facing many Latin American countries and of the already considerable degradation.

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Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works (1968)

UNESCO

The Recommendation encourages protection of all important monuments and sites, not just those identified as major monuments. It recommends the preparation and maintenance of protective inventories of cultural property and suggests legislative and financial measures as well as procedures for setting and implementing priorities.

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European Convention on the Protection of the Archaeological Heritage (1969)

Council of Europe

The Convention calls for the application of scientific methods to archaeological research and an end to illegal excavations as two important principles for safeguarding archaeological heritage. It makes a number of recommendations, including:

- the creation of "reserve zones" for preservation of evidence to be excavated at a later time;
- preparation of inventories of publicly and privately held archaeological objects; and
- exchange of these materials where possible for scientific and educational purposes.

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Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)

UNESCO

The Convention encourages cooperation among nations to prevent the illicit movement of cultural property across borders. States of origin can request assistance from other nations in recovering illegally obtained cultural property; however, the Convention stipulates the state will pay just compensation to innocent purchasers or those who hold valid title to the property. The Convention suggests that states declare some cultural property as inalienable to help prevent its export and, where necessary, facilitate its recovery. The Convention recommends the development of an export certification program to help control the flow of cultural property and to provide an authenticated provenance for the object. Much of the responsibility for controlling the illegal flow of cultural property is placed on the states of origin.

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Convention Concerning the Protection of the World Cultural and Natural Heritage (1972)

UNESCO

The World Heritage Convention was adopted in 1972 by the General Conference of UNESCO. It promotes an international perspective on cultural heritage by inviting member states to submit an inventory of properties forming its national cultural and natural heritage to be included in a list of World Heritage sites. The convention encourages national efforts at protecting cultural and natural heritage and promotes international recognition and cooperation in safeguarding the heritage of the world. (Operational Guidelines for the Implementation of the World Heritage Convention were issued in 1988. They outline the criteria to be met by sites on the World Heritage List.)

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Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage (1972)

UNESCO

The Recommendation calls for States to formulate, develop, and apply policies for the protection, conservation, and presentation of their cultural and natural heritage. It stresses the responsibility of states to protect their heritage for their own citizens and for all humanity. The document recommends increased financial resources for the safeguarding and preservation of the cultural and natural heritage and suggests scientific and technical, administrative, legal, financial, education, and public involvement measures to be taken. Finally, the document recommends areas for international cooperation to help safeguard the cultural heritage.

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Resolutions of the Symposium on the Introduction of Contemporary Architecture into Ancient Groups of Buildings (1972)

ICOMOS General Assembly

The Resolutions outline principles for the harmonious introduction of contemporary architecture into groups of ancient buildings:

- The existing fabric of ancient buildings must be the framework for further development and town planning. Contemporary architecture should be integrated into groups of ancient buildings and should not affect structural or aesthetic qualities of the ancient setting.
- Authenticity is considered the basic criterion; imitations affecting artistic and historical value should be avoided.
- The revitalization of ancient buildings through new use is encouraged as long as structural integrity and character are not compromised.

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European Charter of the Architectural Heritage (1975)

Council of Europe

The Council of Europe declared 1975 the European Architectural Year, leading to the adoption of this Charter, which aims to develop a common European policy for the protection of architectural heritage. The document defines the nature of the European architectural heritage, its importance to the European community, and threats to the heritage from ignorance, neglect, and deterioration as well as economic pressures, motor traffic, inappropriate restoration, and property speculation. The Charter calls for an integrated conservation approach with the following components:

- sensitive restoration techniques,
- the effective use of laws and regulations,
- appropriate administrative support, and
- adequate technical and financial support (including tax incentives).

The Charter encourages development of training facilities and fostering of traditional crafts. Cooperation with the public and coordination between European nations is seen as an important element in the conservation of Europe's architectural heritage.

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Declaration of Amsterdam (1975)

Congress on the European Architectural Heritage, Council of Europe

The Declaration of Amsterdam emphasizes role of planning, education, legal, and administrative measures in protecting the region's architectural heritage. The document stipulates that architectural conservation must become an integral part of urban and regional planning. It calls for integrated conservation involving both local authorities and citizens and taking into consideration social factors. The Declaration notes the need for new legislative and administrative measures as well as appropriate financial support for conservation. The Declaration notes the importance of promoting methods, techniques, and skills for restoration and rehabilitation. The need for better training programs is noted; international exchange of knowledge, experience, and trainees is recommended. Authorities should try to promote an interest in conservation among young people as a prospective discipline. The Declaration stresses the importance of educational programs for youth and the public to foster an appreciation of the architectural heritage of Europe.

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Resolutions of the International Symposium on the Conservation of Smaller Historic Towns (1975)

ICOMOS General Assembly

The Resolutions outline some of the typical features of and threats to smaller historic towns and their settlement structure. Lack of economic activity and abandonment of the historic core are among the problems faced by these towns; the rapid rate of urban migration is of particular concern in the conservation of smaller historic towns in developing countries. To counteract these negative forces, the Resolutions suggest a number of strategies:

- effective planning,
- economic policies that lead neither to disruption or dereliction of the historic fabric of towns, and
- instilling a sense of pride among town residents in the historic environment.

The Resolution emphasizes that urban conservation cannot rely solely on private activity and local initiative but must involve regional authorities and legislation to encourage conservation and discourage property speculation.

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Cultural Tourism (1976)

International Seminar on Contemporary Tourism and Humanism, ICOMOS

This document is the result of the International Seminar on Contemporary Tourism and Humanism held in 1976. It outlines an approach to cultural tourism that recognizes sites and monuments as a source of economic benefit and cultural education. The approach encourages educating tourists, particularly children, about the value of monuments and training those responsible for developing and implementing tourist use of heritage sites.

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Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations, Convention of San Salvador (1976)

Organization of American States

The Convention of San Salvador seeks to identify, register and protect the cultural heritage of the Americas in order to prevent illegal traffic in cultural property and to promote cooperation between the American states. The cultural property protected includes pre- and post-contact archaeological remains, objects, buildings, and monuments as well as books, manuscripts, maps, and other materials housed in libraries and archives and any other cultural property which parties wish to include under the scope of the Convention. Import or export of this property is deemed unlawful unless it expressly authorized by the owner state for the purpose of promoting understanding of national cultures. The Convention encourages registration of collections and transactions and prohibition of imports without appropriate authorization and certification. The Convention encourages nations to develop programs and policies to protect cultural property and stipulates the measures that nations should take if they become aware of any illegal trade in cultural property. The Convention also recommends cooperation between nations to facilitate the exchange of information as well as objects for exhibit. The Organization of American States is charged with overseeing the effectiveness and enforcement of the Convention and establishing an Inter-American Registry of Cultural Property to promote the exchange of cultural property and technical cooperation.

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Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas (1976)

UNESCO

The Recommendation extends the principles laid down by earlier General Conferences. The Recommendation recognizes the importance of the setting—buildings, spatial elements, and surroundings make up historic areas. The document notes that the destruction of historic areas can lead to economic loss and social disturbance. It calls for historic areas to be protected from the damage that can result from insensitive changes that damage authenticity.

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Recommendation Concerning the International Exchange of Cultural Property (1976)

UNESCO

The Recommendation encourages exchanges of cultural property to foster appreciation of the achievements of different cultures and to increase understanding among nations. For the purposes of the Recommendation, cultural property includes items of historical, artistic, scientific, or technical value and interest, as diverse as zoological specimens and cinematographic works. The Recommendation notes that cultural exchange tends to be unilateral; poorer countries and institutions are disadvantaged by the cost and complexity of regulations and restrictions. The Recommendation encourages cultural institutions with several identical or similar cultural objects to offer them for accession by institutions in other countries. Cultural institutions that participate in exchanges must undertake appropriate conservation measures to ensure protection of the cultural property they receive. The Recommendation suggests that the International Council of Museums produce a handbook (with model contracts) to help facilitate exchanges of cultural property.

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Recommendation for the Protection of Moveable Cultural Property (1978)

UNESCO

The Recommendation is intended to supplement existing charters and conventions for the protection of moveable cultural property. It defines the broad range of items that make up moveable cultural property and identifies measures to safeguard property and to indemnify in case of damage, alteration or loss of the property resulting from transport and exhibition, environmental conditions, handling, faulty packaging, and other unfavorable conditions. It calls for governments, museums, and other public authorities, as well as the general public to be involved in efforts to protect moveable cultural property. The document outlines measures for the prevention of risks, including systematic documentation, security measures, adequate funding, training for staff, and conservation techniques best suited to the particular property. The Recommendation calls for education of children and the general public regarding the value of cultural property and the importance of preservation and protection. Member states are urged to collaborate with intergovernmental and non-governmental bodies for the prevention of risks and to suppress theft and illicit trade.

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Recommendation for the Safeguarding and Preservation of Moving Images (1980)

UNESCO

Moving images are representative of the cultural identity of a people and as such have historic, cultural, and artistic value. The Recommendation notes the extreme vulnerability of moving images because of the materials they are composed of and the need to maintain them under very specific technical conditions. Deterioration, accident, and "unwarranted disposal" have already led to the loss of some of the world's moving image heritage. States are asked to take measures to protect moving images, just as they do other cultural property within their care. The Recommendation proposes greater international cooperation.

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The Florence Charter: Historic Gardens (1982)

ICOMOS-International Federation of Library Associations and Institutions (IFLA) International Committee for Historic Gardens

The Florence Charter sets forth the principles and guidelines for the preservation of historic gardens. The Charter defines historic gardens as architectural compositions and recommends their preservation as living monuments. It outlines strategies for maintenance, conservation, restoration, and reconstruction of gardens, including their plans, vegetation, structural and decorative features, and use of water. It recommends limiting use in order to protect gardens' fabric and cultural message. It also addresses legal and administrative issues. The Charter was adopted in 1982 as an addendum to the Venice Charter, addressing the needs of a specific class of cultural property.

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Deschambault Charter for the Preservation of Quebec's Heritage (1982)

ICOMOS Canada

The Deschambault Charter defines the special nature of Quebec's heritage and outlines principles for the preservation of Quebec's material culture, geographic and human environments. The broad definition, which looks not only at the material culture but also at human adaptations to the natural environment, sees cultural landscapes (the result of the interactions of people and nature) as part of the heritage to be protected. Conservation efforts are to be directed at preventing deterioration and destruction of the national heritage. The Charter encourages maintenance of up-to-date inventories and the use of specialized expertise. It also encourages assessment of the importance of the heritage and recommends that the "principles of protection and development of the national heritage must have primacy over all development plans". Citizens are seen as the chief protectors of the heritage the public's right to participate in decisions about national heritage is asserted. The Charter promotes continuous use of the heritage integrated into the social and economic life of the nation, with preference given to traditional use. The Charter encourages the dissemination of information about Quebec's cultural heritage through the educational system and other means in order to make people aware of its value. Finally, it encourages the training of artisans, technicians and professionals.

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Tlaxcala Declaration on the Revitalization of Small Settlements (1982)

Third Inter-American Symposium on the Conservation of Building Heritage/ ICOMOS Mexico

The Declaration recognizes that small settlements bear witness to our cultures and emphasizes the local and national governments' responsibility to help preserve smaller settlements and stem migration to urban centers. The Declaration recognizes the rights of local communities to be involved in decisions regarding their towns and villages. The Declaration notes the destructive influence of the communications media in introducing patterns of behavior and consumption that are contrary to tradition. It asserts that preserving settlements must also involve bettering conditions for residents to encourage the revitalization of communities. Conservation efforts must be interdisciplinary and social service and infrastructure improvements should be introduced with sensitivity, taking into account local values and traditions. The Declaration recommends that regional materials and traditional building techniques are essential to the maintenance of small settlements. It recommends the government grants to protect dwellings in small settlements, which would ensure both the continuation of the building heritage and affordable housing. It also encourages schools of architecture to initiate courses in conservation of the vernacular architectural heritage and in traditional building techniques.

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Declaration of Dresden (1982)

ICOMOS Symposia

The Declaration of Dresden is concerned with the reconstruction of monuments destroyed by war. It calls for documentation of monuments as a means to ensure their protection in times of conflict and notes the reasons and techniques for reconstruction as well the importance of exchanging knowledge between nations as a way to ensure appreciation and protection of this heritage. The Declaration supports earlier recommendations by UNESCO and the ICOMOS General Assembly on the prevention of war and calls for international cooperation and disarmament in order to prevent war.

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Appleton Charter for the Protection and Enhancement of the Built Environment (1983)

ICOMOS Canada

The Appleton Charter of ICOMOS Canada outlines principles for the preservation of the built environment regarding its protection, value, setting, relocation, enhancement, use, additions, and environmental control. The Charter emphasizes management of the urban environment as an important aspect of conservation of cultural heritage. Levels of intervention (preservation, period restoration, rehabilitation, period reconstruction, redevelopment) and scales of intervention (maintenance, stabilization, addition, removal) are described. The charter recommends that interventions consider cultural significance, condition and integrity of the fabric, contextual value, and the appropriate use of available physical, social, and economic resources. It calls for public participation in the decision-making process. The Charter also includes principles of practice, among which is a recommendation regarding patina, which seen as part of the historical integrity of the built environment.

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Declaration of Rome (1983)

ICOMOS Symposia

The Declaration of Rome acknowledges the challenges to the conservation of cultural property in Italy, including:

- political and socio-economic reasons
- an unclear relationship between theory and practice in conservation
- lack of coordination between government agencies and organizations
- insufficiently qualified persons charged with architectural conservation are two major problems.

It recommends that the different bodies concerned with conservation improve coordination at all levels and confirms the importance of specialized training by those employed to carry out restoration work. The Declaration supports the strengthening of international organizations, such as the International Centre for the Study of Preservation and the Restoration of Cultural Property (ICCROM), responsible for education and training.

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European Convention on Offences Relating to Cultural Property (1985)

Council of Europe

Under the provisions of the Convention, the Parties agree to act to enhance public awareness of the need to protect cultural property and to cooperate to prevent offences related to cultural property. The document outlines the legal provisions (Appendix I), types of property (Appendix II), and nature of offences (Appendix III). It addresses the issue of restitution in the event of an offence and calls on Parties to cooperate in such cases; the process for requests for extradition is described. The Convention encourages Parties to cooperate with the European Committee on Crime Problems and the International Crime Police Organization (Interpol).

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Convention for the Protection of the Architectural Heritage of Europe (1985)

Council of Europe

The Convention signed in Granada outlines legislative measures and protections to safeguard the cultural heritage of the European states as well as conservation policies to protect the architectural heritage. Among the recommended measures are:

- conservation of the architectural heritage as a component of town planning,
- adaptive reuse of buildings,
- training in traditional crafts involved in conservation and restoration,
- limiting public access as a conservation measure,
- public awareness and educational programs and support for training, and
- technical assistance and exchange of information.

Parties to the document agree to exchange information and coordinate conservation policies.

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First Brazilian Seminar About the Preservation and Revitalization of Historic Centers (1987)

ICOMOS Brazil

The document sees urban historical sites are dynamic, socially created entities that are "part of a wider totality, comprising the natural and the built environment and the everyday living experience of their dwellers." Preservation of historic centers should therefore be central to urban planning. The document discourages the imposition of severe use restrictions; rather, traditional residence and work should continue in the historic built environment. It encourages the development of inventories, community participation, and various legal mechanisms to protect historic centers. Finally the document stresses that the social value of historic centers must take precedence over economic value.

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The Washington Charter: Charter on the Conservation of Historic Towns and Urban Areas (1987)

ICOMOS General Assembly

This Charter, adopted by the ICOMOS General Assembly in 1987, establishes the principles and guidelines for the protection and conservation of historic towns. The Charter seeks to complement the Venice Charter, whose emphasis is on the individual monument. It addresses such issues as:

- integration of preservation objectives into planning policies;
- qualities of historic towns that should be preserved;
- participation of residents in the preservation process; and
- the social and economic aspects of historic town preservation.

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Recommendation on the Safeguarding of Traditional Culture and Folklore (1989)

UNESCO

The Recommendation approved by the General Assembly concerns the preservation of the intangible aspects of heritage: traditional culture and folklore. The fragility of the intangible heritage, particularly with regard to oral traditions, is noted. The document defines the nature of folklore and its forms-language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts-and recommends conservation strategies. These include:

- documentation of traditions,
- establishment of archives, and
- creation of museums for folklore;
- support for transmitters of traditions.

The document recommends development of educational programs to encourage the study of folklore and calls for scientific research regarding the preservation of folklore. Finally, the Recommendation notes the negative impact of industrial culture and mass media on traditional culture and calls for support for folk traditions to counter these effects.

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The Vermillion Accord on Archaeological Ethics and the Treatment of the Dead (1989)

World Archaeological Congress (WAC)

Adopted at the South Dakota WAC Inter-Congress, this six-point accord outlines standards for treatment of the mortal remains of the dead. It calls for respect for the mortal remains of the dead in accordance with the wishes of the dead, relatives, and the local community as well as the value of scientific research.

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Charter for the Protection and Management of the Archaeological Heritage (1990)

ICOMOS International Committee on Archaeological Heritage Management (ICAHM)

The ICAHM Charter, inspired by the success of the Venice Charter, was created in response to the increasing threats to archaeological sites worldwide, especially from looting and land development. The Charter attempts to establish principles and guidelines of archaeological heritage management that are globally valid and can be adapted to national policies and conditions. The Charter encourages legislation to protect the archaeological heritage, based on inventories and general surveys of the resources. It lays out general principles for investigation, maintenance, and conservation as well as reconstruction of architectural heritage. It also notes the role of high academic and professional standards in relevant fields of expertise and the need for international cooperation.

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Québec City Declaration (1991)

World Heritage Convention (OWHC)

The Québec City Declaration links management and conservation as a means to safeguard historic towns. The Declaration announces the intention of establishing a network of world heritage towns to support the implementation of the World Heritage Convention and improve cooperation and exchange of information between historic cities. The network is specifically charged with:

- gathering and disseminating information on management,
- updating and distributing a management guide for historic cities,
- promoting research related to historical urban areas,
- providing support for historic cities that organize symposia such as the Québec City event, and
- furnishing information that will be of use to historic towns.

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Charter for the Conservation of Places of Cultural Heritage Value (1992)

ICOMOS New Zealand

This charter establishes principles to guide owners, authorities, tradespersons and professionals in conserving places of cultural heritage value in New Zealand, where the Treaty of Waitangi recognizes the indigenous Maori and Moriori as exercising responsibility beyond current legal ownership for their treasures, monuments and sacred places. The charter sets forth general principles and calls for conservation methods that show the greatest respect for, and involve the least possible loss of, material of cultural heritage value. It also outlines conservation processes and provides a list of definitions of conservation terms.

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A Preservation Charter for the Historic Towns and Areas of the United States of America (1992)

ICOMOS U.S.

This Charter represents the ICOMOS United States' adaptation of the 1987 ICOMOS Historic Towns Charter. It defines four objectives for the preservation of historic towns in the U.S., emphasizing preservation as integral to community planning. It sees property owners and residents as playing a key role in the protection of historic towns, participating in the planning process. In 18 principles, the document outlines the components of a successful preservation program for historic towns, including studies of the history, culture, architecture and other appropriate fields in order to understand the historic context as well as considerations about the future of the area. Other principles include:

- a harmonious relationship between the historic area and it's surrounding region,
- thorough study and documentation prior to any changes,
- involvement of residents in planning,
- retaining sound, affordable housing and avoiding displacement of residents, and
- respecting the scale and character of the surrounding built environment in new construction.

The document addresses such specific issues as the introduction and development of parking, roads and transit systems. It encourages protection of the historic area and its residents from natural disasters as far as possible. It also encourages educational efforts and specialized training to improve preservation efforts in historic areas. Finally, the Charter suggests the creation of preservation organizations and financial incentives that encourage preservation.

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Charter of Courmayeur (1992)

UNESCO

The Charter outlines national and international actions that are recommended to protect against illicit trade of cultural objects, building on previous policies. The Charter encourages governments to develop legislation and treaties to protect cultural patrimony and to increase the importance of cultural property in crime prevention programs. The Charter also suggests developing mechanisms to facilitate international cooperation among governments and collaboration with ICPO/Interpol. It emphasizes the importance of information about cultural patrimony and establishing inventories with photographs if possible. The Charter recommends that parties provide technical assistance to help other countries establish national inventories and databases. It also recommends that a document explaining the dimensions of the problem of illicit trade should be produced and submitted to appropriate government officials. Governments are urged to criminalize the illicit export and import of cultural objects. To control the flow of cultural property, the Charter recommends the use of export permissions from countries of origin, the development of an internationally recognized licensing system for art dealers, and improved exchange of information between governments and agencies.

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European Convention for the Protection of the Archaeological Heritage of Europe (Revised) (1992)

Council of Europe

The revised European Convention on the Protection of the Archaeological Heritage reflects an evolution in attitudes towards the protection of the archaeological heritage and echoes many of the principles that are included in the ICOMOS Charter for the Protection and Management of the Archaeological Heritage of 1990. The Convention defines the archaeological heritage and identifies measures for its protection including the creation of inventories for sites and monuments and the creation of archaeological reserves. The Convention addresses the prevention of illicit excavation and trade of the archaeological heritage. It also recommends the integration of conservation with planning and development, calls for financing of archaeological research and conservation, and the collection and dissemination of information regarding the archaeological heritage. It recommends efforts to promote public awareness and suggests mutual technical and scientific assistance through pooling of expertise and exchanges of experts.

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New Orleans Charter for the Joint Preservation of Historic Structures and Artifacts (1992)

Association for Preservation Technology International and the American Institute for Conservation of Historic and Artistic Works

The New Orleans Charter is concerned with artifacts and collections which are housed in historic structures; it provides a framework for an integrated preservation approach and is aimed at managers and administrators. The Charter stipulates:

- the needs of both historic structures and the artifacts housed therein must be taken into consideration in any preservation effort;
- provisions for the care of both should be included in institutional mission statements;
- interdisciplinary collaboration in preservation efforts should be encouraged; and
- measures must not be taken which favor either the preservation of artifacts or the preservation of the structure at the expense of the other.

The Charter stresses the importance of documentation at all stages of the preservation effort and that any preservation strategies should be appropriate to the institutions' ability to implement and maintain them. It recommends the least amount of intervention possible.

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Declaration of Rio (1992)

United Nations Environment Program

Seeking to build upon the Declaration on the Human Environment (1972), the United Nations Conference on Environment and Development issued the Declaration of Rio. The Declaration states that since humankind is primarily concerned with sustainable development, States are responsible for fulfilling the developmental and environmental needs of present and future generations. It calls for all States to cooperate in global partnership by assisting developing countries that are environmentally vulnerable. In addition, the Declaration calls for the implementation of effective environmental legislation that addresses the problems of environmental degradation, focusing not only on species and habitats but also ecosystems. It also declares that States shall respect international law by protecting the environment in times of armed conflict.

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Declaration of Oaxaca (1993)

Mexican National Commission for UNESCO

This Declaration was adopted at the Seminar on Education, Work, and Cultural Pluralism and emphasizes the importance of recognition and inclusion of indigenous peoples in solving the principal problems facing human society. It does not relate directly to the conservation of material culture; rather, the Declaration is concerned with cultural pluralism, environmental management, and protection of the natural resources of the Ibero-American world. It calls for both the developing and developed worlds to cooperate in the management and use of natural resources and for the relationship of indigenous people to nature to be respected. The Declaration supports initiatives of UNESCO and indigenous movements including the Universal Declaration of Rights of the World's Indigenous People.

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The Fez Charter (1993)

Organization of World Heritage Cities (OWHC)

The Fez Charter was adopted at the Founding General Assembly of the Organization of World Heritage Cities in 1993. The document recognizes the important role that cities play as cultural centers and exemplars of human achievement. The Charter recognizes the fragility of cities and the forces of change at work in them. It notes the importance of cooperation on the part of residents, modern and efficient management techniques, and adequate financial resources if cities are to be protected. Parties to the Charter agree to cooperate for the welfare of the citizens of World Heritage Cities and to improve support for conservation in World Heritage Cities through research, training, and exchange.

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Guidelines for Education and Training in the Conservation of Monuments, Ensembles and Sites (1993)

ICOMOS

The ICOMOS General Assembly adopted these guidelines in an effort to develop standards and guidelines for education and training in the conservation of monuments, groups of buildings (ensembles), and sites. The guidelines emphasize that conservation work should be entrusted to persons who are competent to perform the work and describe the skill set conservators should be expected to have as a result of their education and training. These include the ability to:

- identify the use and significance of a monument, ensemble, or site;
- understand the setting of the monument or site in relation to its surroundings;
- diagnose causes of decay as a basis for appropriate decay;
- communicate with non-specialists;
- know and apply the principles of international conventions and recommendations;
- make ethical conservation judgements that ensure the long-term welfare of the cultural heritage;
- recognize when advice of specialists is needed; and
- provide expert advice on maintenance and management strategies.

The guidelines also address the training of craftspersons in conservation, the recording and revival of historic skills, the development of a regional center for education and training, international exchanges of teachers, and regular peer review of training programs. Finally, the guidelines outline the resources that should be available to support specialist courses. Because documentation is key to the conservation of cultural heritage, the guidelines also recommend that countries have an institute for research and archive for recording its cultural heritage and all related conservation works.

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UN General Assembly Resolution (A/RES/48/15) on the Return or Restitution of Cultural Property to the Countries of Origin (1993)

UN General Assembly

The Resolution supports international cooperation and efforts of international organizations to ensure the restitution or return of cultural property. It recommends:

- strengthening existing legislation for the protection of cultural property,
- requiring archaeologists to provide photographic documentation of objects discovered in the course of excavations,
- continued efforts in cooperation with UNESCO in the development of inventories of cultural property, and
- greater public awareness regarding restitution and return of cultural property.

It encourages cooperation with the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Country of Origin or Its Restitution in Case of Illicit Appropriation.

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Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage (1994)

UNESCO

The Draft includes 23 articles and related commentary regarding the protection of the underwater cultural heritage. It defines the nature of the underwater cultural heritage, the legal (ownership) status of underwater heritage and the establishment of cultural heritage zones. The Convention applies to heritage that has been under water for 100 years or more though State parties may choose to include heritage that has been submerged for less than 100 years. The Convention does not include warships in its scope. The Convention recommends actions to be taken regarding seized underwater cultural heritage. States are encouraged:

- to collaborate together in investigation, research, documentation, conservation, and promotion of this heritage,
- to disseminate information using international databases, and
- to develop educational programs to raise public awareness of the value of underwater cultural heritage and the threats that it faces.

Provisions for dispute resolution are included.

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The Nara Document on Authenticity (1994)

ICOMOS Symposia

In recent years, authenticity has become a central concern in the conservation of cultural heritage. The Nara Document builds on the Venice Charter in light of an expanding scope of cultural heritage concerns. It addresses the need for a broader understanding of cultural diversity and cultural heritage as it relates to the conservation. The document underscores the importance of considering the cultural and social values of all societies. It emphasizes respect for other cultures, other values, and the tangible and intangible expressions that form part of the heritage of every culture. There are no fixed criteria to judge value and authenticity of cultural property; rather it must be evaluated within the cultural context to which it belongs. Though responsibility for the care and management of heritage belongs primarily to the culture that produced it, the document calls for adherence to the principles and responsibilities imposed by international charters.

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Resolution on Information as an Instrument for Protection against War Damages to the Cultural Heritage (1994)

UNESCO / ICOMOS

Responding to increased and deliberate destruction of important monuments and other cultural property during armed conflicts, the Resolution asserts that deliberate war damage should be charged as a war crime under the Hague Convention of 1954. Although knowledge of cultural heritage can facilitate the deliberate targeting during conflict, nonetheless attempts to increase mutual understanding between cultures should continue. The Resolution calls for:

- the protection of cultural heritage to be part of any UN Peace-Keeping mission,
- heritage monitors to be appointed to such task forces, and
- UN military personnel to be trained regarding conventions for the protection of cultural property.

The Resolution notes that few nations have registered their most valuable cultural assetsand encourages to do so. The Resolution supports a number of initiatives, including:

- a review of the 1954 Hague Convention,
- a fund for cultural heritage at risk,
- school programs to educate about the conservation of cultural heritage, and
- training for journalists and other members of the media regarding provision of the Hague Convention and the World Heritage Convention.

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Unidroit Convention on Stolen or Illegally Exported Cultural Objects (1995)

UNESCO

The Unidroit Convention addresses the problem of theft and the illicit trade of cultural property. The document defines nature of the objects covered and includes provisions for the restitution of stolen property. The Convention also calls for the return of illegally exported cultural objects and outlines the circumstances under which such property shall be ordered returned. Requests for returns shall be brought within three years of the State learning of the location and/or identity of the possessor of the stolen or illegally exported object or within fifty years of the actual excavation. The Convention calls for fair and reasonable compensation to be paid where the possessor of stolen or illegally exported cultural property can show ignorance of the crime and demonstrate due diligence at the time of the purchase. Wherever possible, payment should be sought from the party who illegally transferred the property. With the agreement of the State requesting return, the possessor can also choose to retain the object instead of compensation. The Convention includes a special provision with regard to the return of cultural property of tribal and indigenous groups; the 50-year limit does not apply to objects that were made by tribal members or are used for traditional or ritual purposes by the community.

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Bergen Protocol on Communications and Relations among Cities of the Organization of World Heritage Cities (1995)

Organization of World Heritage Cities (OWHC)

The Protocol is the result of the Second General Assembly of the OWHC. It reiterates the aim of identifying tools for the responsible management of historic urban areas, sharing information on dealing with problems of tourism, pollution, fires, and natural disasters through publication of a newsletter or exchanges of specialist. It invites other international organizations concerned with the care of cultural heritage to participate in OWHC projects. The document also includes commitments for cooperative projects with OWHC from UNESCO, the Council of Europe, ICCROM (International Centre for the Study of the Preservation and Restoration of Cultural Property), and ICOMOS. OWHC is also included in a Blue Shield disaster preparedness initiative.

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Charter for Sustainable Tourism (1995)

World Conference on Sustainable Tourism

The Charter is the result of the World Conference on Sustainable Tourism. It acknowledges that while tourism can be a positive force for socio-economic development and cultural interchange, it can also have negative consequences for communities. It calls for planning and management of tourism that conserves and protects the natural and cultural heritage. The Charter also calls for tourism to be ecologically bearable, economically viable, socially equitable for local communities, and sustainable for the future. With regard to the cultural heritage, the Charter calls for tourism to consider its effect on both the cultural heritage and the traditions of the local community. The Charter recommends special assistance for environmentally and culturally vulnerable areas and for areas that have been degraded as a result of high impact tourism.

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Secretary of the Interior's Standards for the Treatment of Historic Properties (1995)

United States National Park Service

This document sets forth in nontechnical language common-sense standards to be applied to all properties listed in the National Register of Historic buildings. The standards cover four distinct approaches to treatment of historic properties:

- preservation—focusing on maintenance and repair;
- rehabilitation—adapting the property to changing use while retaining its historic character;
- restoration—depicting the property at a particular period in its history;
- and, reconstruction—recreating vanished portions of a property for interpretive purposes.

The document also sets forth standards for choosing a suitable treatment for a historic building or landscape.

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Charter for the Protection and Management of the Underwater Cultural Heritage (1996)

Adopted by the ICOMOS General Assembly

The Charter addresses the conservation needs of underwater cultural property; it is intended to supplement the ICOMOS Charter for the Protection and Management of Archaeological Heritage of 1990. The Charter outlines fundamental principles for the conservation of the underwater heritage and discusses issues of funding, research objectives, qualifications of the team members, investigation, documentation, material conservation, management and maintenance of the site, and dissemination of information about the underwater heritage. Preservation *in situ* is given first preference. The Charter stresses that archaeological material must be treated during the investigation as well as during transit and over the long term. It encourages international cooperation and exchange of specialists to facilitate and improve research and investigations of the underwater heritage. It also encourages dissemination of information to the public regarding the significance of the underwater heritage and coordination and communication with concerned communities regarding proposed investigations.

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Final Communiqué of the NATO-Partnership for Peace Conference on Cultural Heritage Protection in Wartime and in State of Emergency (1996)

North Atlantic Treaty Organization (NATO)

In June 1996 a meeting of NATO representatives and representatives of cultural institutions and organizations met in Krakow to discuss means of protection for cultural property during times of conflict and emergency. The resulting communiqué recognizes the value of preparedness and recommends:

- the publication and distribution of regulatory documents concerning the protection of cultural property;
- international cooperation and exchange of information regarding experience with implementation of the Hague Convention and other such conventions; and
- improvements that could be made to the implementation of the Hague Convention, including extending the definition of armed conflict to include internal conflicts and improving markings for protected property.

The document proposes that willful damage of property in violation of the Hague Convention be considered a war crime and mechanisms to facilitate the return of illegally taken cultural property should be improved. NATO is encouraged to work with UNESCO and the International Committee of the Blue Shield to improve readiness and response capability. The participants supported a proposal by Poland for the establishment of an international center for the training of civilian and armed forces personnel to protect cultural property in times of armed conflict and other emergency situations.

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Declaration of Valencia (1996)

Forum UNESCO

The Declaration outlines the objectives of Forum UNESCO: University and Heritage, a network of universities concerned with the protection of cultural heritage and the role of universities in supporting efforts to conserve cultural heritage. The network encourages the teaching of cultural heritage, cooperation and exchange between universities, and the mobilization of human and technical resources for the protection of cultural heritage. The Declaration recommends that theoretical knowledge be supplemented by practical experience and encourages the development of mutual understanding between students through exchange programs.

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Declaration of San Antonio (1996)

ICOMOS Symposia

The Declaration of San Antonio was the result of a symposium held in Texas in 1996 on the subject of authenticity in the conservation and management of the cultural heritage of the Americas. The document is a regional response to a larger international debate on the nature of authenticity and conservation. The San Antonio Declaration sees a direct connection between authenticity and identity: cultural identity is the foundation of the cultural heritage of the Americas and its conservation. Understanding of the history, significance, and values associated with a site is important to identifying authenticity. The Declaration considers only the original, historic fabric to be authentic. Thus it is important to understand the social value of the site not just the significance of the physical fabric. The Declaration makes a distinction between dynamic sites, where material changes may be acceptable as part of an ongoing evolution of the site, and static sites, where the physical fabric is felt to require the highest level of conservation and alterations should be minimized. The Declaration contains a number of recommendations concerning architecture and urbanism, archaeological sites, and cultural landscapes.

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Declaration of Quebec (1997)

Forum UNESCO

The Declaration of Quebec was the result of the Second International Seminar of Forum UNESCO. It reaffirms the participants' readiness to implement the principles of the international University and Heritage network; requests that the University of Laval in Quebec establish a UNESCO Chair in Heritage; and asks that the UNESCO General Director support the development and coordination of the network.

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Document of Pavia (1997)

Associazione Secco Suardo

The Document of Pavia is the result of a European effort to develop standards for the education and training of conservators/restorers. It encourages the European Union and specialists in the field to promote the field of conservation-restoration, recommends interdisciplinary exchange with other disciplines, and the definition of professional competencies of the conservator-restorer for Europe. In terms of the training conservators-restorers receive, the document recommends:

- a balancing of theoretical and practical knowledge,
- the teaching of communication strategies,
- the establishment of cooperative exchange programs among training institutions, and
- the promotion of research in conservation-restoration.

Publication of a multilingual glossary of conceptual definitions is recommended. The Document also encourages the establishment of a regulatory framework to ensure the quality of conservation-restoration interventions; this should include qualifications of team members and development of specifications for projects. The establishment of the European Network for Conservation/Restoration Education (ENCoRE) furthers this effort.

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Evora Appeal (1997)

Organization of World Heritage Cities

The Evora Appeal addresses the threats and benefits of cultural tourism in historic areas. The participants endorse the concept of sustainable tourism as it was adopted in the Charter of the World Conference on Sustainable Tourism of 1995. The Evora Appeal calls on all concerned parties to promote a number of objectives in the development and management of tourism related activity, which include:

- ensuring the quality of life and respect for the cultural identity of residents;
- encouraging regional, national and municipal authorities to work together to develop fiscal and legislative guidelines that ensure job creation and the development of tourism; and
- encouraging tourism industries to develop a World Fund be aimed at analyzing the impact of tourism on historic monuments and sites and the possible damage to World Heritage Cities.

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The Stockholm Declaration : Declaration of ICOMOS marking the 50th anniversary of the Universal Declaration of Human Rights (1998)

ICOMOS Symposia

In recognition of the 50th anniversary of the Universal Declaration of Human Rights, the ICOMOS Declaration recognizes the right of all peoples to participate in the cultural life of their communities. The right to cultural heritage, called an "integral part of human rights", carries duties and responsibilities for individuals and communities. These rights include:

- the right to have one's heritage respected as an expression of cultural identity,
- the right to understand one's heritage and that of others,
- the right to the wise and appropriate use of heritage,
- the right to participate in decisions which affect the heritage, and
- the right to form organizations for the protection of the heritage.

Development efforts must take these rights into consideration; society, the private sector, and individuals must reconcile preservation and development interests. The Declaration calls for international cooperation through international conventions and other legislative measures.

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Declaration of Melbourne (1998)

Forum UNESCO

The third international seminar of Forum UNESCO was held at Deakin University in Melbourne, Australia. The resulting declaration reiterates the objectives of the international network of universities that have programs related to tangible and intangible heritage and outlines commitments to expand the network. These include strengthening training of university students, sharing and exchanging knowledge and skills, increasing public awareness of the importance of cultural heritage, and strengthening cooperation with organizations responsible for cultural heritage including ICOMOS, the International Council of Museums, and the World Monuments Fund. The Declaration also recommends that teaching programs include cultural heritage law in their curriculum and strengthen international cooperation through training programs, scholarship and fellowships. Deakin University also declares its intention to establish a regional center for international conservation of cultural heritage.

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Recommendation on Measures to Promote the Integrated Conservation of Historic Complexes Composed of Immovable and Moveable Property (1998)

Council of Europe, Committee of Ministers

This Recommendation addresses the need to extend the protection of the built heritage by addressing historic complexes, that is, buildings and structures along with their contents. The document asks member states to identify and classify historic complexes (public and private) and to put in place legislation to provide for their protection. It also recommends sanctions to ensure that objects not be separated from their built environment and that incentives, such as tax relief, subsidies, and low-interest loans, be enacted to encourage preservation.

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The Burra Charter: The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance (1999)

Australia ICOMOS

The Burra Charter is a national charter that establishes principles for the management and conservation of cultural sites in Australia. The Charter is particularly significant for its definition of cultural significance and the standards it outlines for using cultural significance to manage and conserve cultural sites. It provides an example of how international principles can be adapted to the values and needs of a particular nation or particular cultural groups within that nation.

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Charter on the Built Vernacular Heritage (1999)

CIAV (International Committee for Vernacular Architecture) and ICOMOS

Recognizing that the forces of globalization have made vernacular architecture—traditional and natural community housing—extremely vulnerable, this charter on the built vernacular heritage outlines issues and principles for conservation. In addition, it sets forth guidelines for conservation practice, including research and documentation, preserving traditional craft and building skills, adaptive re-use, and the need for training to educate conservators and communities.

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International Wood Committee Charter: Principles for the Preservation of Historic Timber Buildings (1999)

ICOMOS

This document defines basic principles and practices for the protection and preservation of historic timber structures. It calls attention to the diversity and scarcity of historic timber structures and their vulnerability to material decay and degradation, and makes recommendations in seven areas:

- inspection, recording, and documentation of materials, skills, and technologies should be performed;
- monitoring and maintenance should be conducted on a regular basis;
- interventions should follow traditional means, be reversible or not impede future preservation, and not hinder future access to evidence in the structure or site;
- repair and replacement materials, craftsmanship and construction technology should, where possible, correspond with those used originally;
- historic forest reserves should be established as source of appropriate timber for preservation and repair of historic structures;
- contemporary materials and technologies should be used with the greatest caution and only where there is assured benefit;
- education and training are essential to a sustainable preservation and development policy.

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International Cultural Tourism Charter: Managing Tourism at Places of Heritage Significance (1999)

ICOMOS

The objectives of this charter are to promote and manage tourism in ways that respect and enhance the heritage and living cultures of the host communities, and to encourage a dialogue between conservation interests and the tourism industry. It outlines six principles of cultural tourism:

- conservation should provide well-managed opportunities for tourists and members of the host community to experience and understand the local heritage and culture at first hand;
- the relationship between heritage places and tourism is dynamic and should be managed in a sustainable way for present and future generations;
- conservation and tourism planning should create a visitor experience that is enjoyable, respectful, and educational;
- host communities and indigenous people should be involved in planning for conservation and tourism;
- tourism and conservation activities should benefit the host community, improving development and encouraging local employment;
- tourism programs should protect and enhance natural and cultural heritage characteristics.

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Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999)

UNESCO

The Second Protocol is intended to supplement the provisions of the original 1954 Hague Convention and to reinforce its implementation. It contains general provisions for the safeguarding of cultural property that include taking preparatory measures in times of peace, fostering respect for cultural property, and employing precautionary measures in times of conflict. The Convention also calls for provisions enhanced protection status for cultural heritage property and immunity granted under such status. It describes the circumstances under which enhanced protection status can be lost, suspended or cancelled. The Convention also outlines criminal responsibility and jurisdictional procedures in the event of violations. It specifically addresses the protection of cultural property in the event of domestic, national armed conflicts. The Convention calls for informational and educational programs to foster appreciation and respect for cultural property. Finally, the Convention establishes the Committee for the Protection of Cultural Property in the Event of Armed Conflict which is to develop guidelines for implementation and be responsible for the granting and rescinding of enhanced protection status. A Fund for the Protection of Cultural Property in the Event of Armed Conflict is also established.

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Convention on Biological Diversity (2000)

United Nations Environment Program

The Convention, as an international treaty, identifies a common problem, sets goals and policies and obligations, and organizes technical and financial cooperation. The responsibility for achieving the goals rests primarily with the countries themselves. The Convention requires that States develop national biodiversity strategies and plans, and integrate these into the broader national plans for the environment and development. States must:

- identify and monitor components of biological diversity in need of conservation;
- establish protected areas;
- rehabilitate and restore degraded ecosystems in collaboration with local residents;
- prevent the introduction of alien species which threaten ecosystems;
- adopt economically and socially; and
- promote and encourage public awareness.

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European Convention on Landscape (2000)

Council of Europe

The Convention sets forth the principles and guidelines for the preservation of landscapes. It defines landscapes as areas "whose character is the result of the interaction of natural and/or human factors." It recognizes the contributions that landscapes have on the formation of local cultures, including those that may be considered degraded. The Convention contains a general outline for the safeguarding of landscapes that includes increasing awareness of their value, promoting multidisciplinary training programs, and assessing the landscapes identified. It also calls for the introduction of instruments aimed at protecting, managing, and/or planning the landscape. Finally, the Convention encourages cooperation among member States, including the exchange of information and the creation of joint landscape programs.

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Convention on the Protection of Underwater Cultural Heritage (2001)

UNESCO

The Convention sets out the principles and guidelines that States must follow in the safeguarding of underwater cultural heritage. It defines underwater cultural heritage "as all traces of human existence having, historical or archaeological character" which are discovered under water. The Convention emphasizes the preservation in situ of underwater cultural heritage, as well as non-intrusive methods of documentation of said culture for the education of the public. It also states that any activities directed at underwater cultural heritage must avoid the disturbance of human remains or venerated sites. Furthermore, the Convention strictly prohibits the commercial exploitation of underwater cultural heritage.

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Convention for the Safeguarding of Intangible Cultural Heritage (2003)

UNESCO

The Convention, building on the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore, establishes the necessary measures that States should take in the safeguarding of Intangible Cultural Heritage (ICH). The Convention defines the nature and forms of ICH—oral traditions, expressions, language, performing arts, social practices, rituals, festive events, traditional craftsmanship, and knowledge and practices concerning nature and the universe—and recommends ways to preserve them. Noting the threat that globalization and social transformation pose to ICH, safeguarding measures include:

- identification and documentation of traditions;
- research;
- preservation, protection, and promotion;
- transmission, particularly through formal and non-formal education; and
- revitalization of the various aspects of such heritage.

The Convention also creates the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage and establishes a fund for financial assistance.

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ICOMOS Charter on the Interpretation and Presentation of Cultural Heritage Sites (2007)

ICOMOS

Building on the Venice Charter, this charter seeks to establish guidelines for the interpretation of cultural heritage sites. It emphasizes the role of public communication and education in heritage preservation. The Charter identifies heritage sites and the intangible elements associated with the site as a resource for learning from the past. Therefore, interpretive programs must distinguish and recognize the phases in the site's evolution in order to respect their authenticity. The Charter also emphasizes the inclusion of all stakeholders in the interpretation of a site and acknowledges that in some circumstances, a community may opt to not have a site publicly interpreted.

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ICOMOS Charter on Cultural Routes (2008)

THE ICOMOS CHARTER ON CULTURAL ROUTES

The Charter on Cultural Routes illustrates the progression of ideas relating to cultural properties and the increasing significance of values related to their setting and territorial scale, and reveals the macrostructure of heritage. The charter discusses the interactive, dynamic, and evolving processes of intercultural connections that convey the rich diversity of contributions by world peoples to cultural heritage.

Objectives of the charter include:

- To establish basic principles and methods of research specific to Cultural Routes as they relate to previously established categories of cultural heritage assets.
- To propose essential procedures for the development of knowledge about the evaluation, protection, preservation, management and conservation of Cultural Routes.
- To define necessary guidelines, principles, and criteria for correct use of Cultural Routes as resources for sustainable social and economic development, while simultaneously respecting their authenticity and integrity, appropriate preservation, and historical significance.
- To determine the bases for national and international cooperation essential for research, conservation, and development projects related to Cultural Routes.

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ERPANET

PRINCIPLES OF DIGITAL PRESERVATION

Draft v. 4.1, October 30, 2002

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Introduction

The European Commission funded ERPANET project was established in November 2001, with the aim of uniting numerous diverse initiatives in the area of digital preservation. This charter with Principles of Digital Preservation has been drafted in order to provide organisations and individuals with a declaration of principles, interests and intentions. The primary aim is to highlight the importance of the preservation of digital objects, and concurrently build a community around it. It is through this approach that better concerted action can be achieved. The Spanish presidency has offered a resolution in this area to the Council of Ministers in June 2002.

UNESCO has also launched in 2002 a new initiative on 'Preserving Our Digital Heritage' alongside the existing Memory of the World Programme. The aim is to build a line of defence against the loss of valuable information which will be implemented from the initial point of creation. One of the deliverables will be an UNESCO charter on digital preservation. UNESCO has also drafted a medium term strategy on this issue. In the USA, the Library of Congress has been commissioned to build a national programme on digital preservation together with other leading institutions. These initiatives are either limited in scope or geographically bound. This Charter aims to be comprehensive and to include the whole area of preservation of digital information.

To date the leading actors in this area have predominantly come from the library and archive sectors. However, the developing trend has been one of heterogeneous initiatives from separate sectors. The following statement intends to unite communities active in the area of digital preservation and to provide them with a common basis of understanding and firm foundation for knowledge sharing, while strongly supporting their efforts to make further co-ordinated progress in finding new strategies and perhaps even solutions. It also intends to create a network of interested users and to strengthen existing networks of professionals. It aims to launch a European and international campaign, with an awareness of other initiatives.

This document will evolve over time and will have different versions, which will reflect the feelings and interests of the communities represented in ERPANET, until a final version will be published at the end of the project.

Background

In all domains the amount of digital information is increasing at a rapid rate, this raises crucial questions of preservation. Our intellectual capital, as laid down in educational, scientific, public, cultural and other intellectual resources, is increasingly at risk by the volatile character of digital objects and the rapid developments in information technology. This Charter has been drafted in order to identify the issues at stake, to stress the relevance to society of taking action, and to identify the common interest of different communities. The Charter will provide support and a common basis to co-ordinate efforts being undertaken in Europe by formulating principles and objectives with respect to digital preservation that can be or are shared by the communities involved.

The growing need for adequate management and preservation of digital information is recognised in many stakeholder communities. It has lead to efforts in disparate domains to prevent any loss of information that may impact upon further development of the European economy, knowledge, research and cultural heritage. The efforts aim to achieve enduring preservation of, and access to, new and existing information sources.

Based on these considerations the following statement has been drafted to achieve a concerted and co-ordinated effort in the area of digital preservation by all organisations and individuals that have an interest and share these concerns.

The Charter

Scope

The impact of the use of IT on creating and using information, on communication and networking in society is enormous. In order to sustain ongoing access to new and old information resources swift and unified action is required. Business companies and governments are pushing to use the possibilities provided by new technology. Citizens and individuals are becoming increasingly aware of the opportunities that are offered. Together they are moving toward a new information society.

For realising and enabling that new, but still undefined society and its associated concepts of e-citizenship and e-government, it is necessary to build a robust infrastructure. An important part is to address the management, maintenance and preservation of the created information resources, regardless of their origin.

ERPANET will initially be limited to initiatives and projects within the European Union and its associated states. However, when established, co-operation with initiatives elsewhere will be explored. It has to be explicitly stated that this initiative takes a multilingual approach and is not exclusively English language oriented.

The scope of this declaration is the whole chain or life-cycle from creation to disposal and the actors involved. With this perspective different aspects will be addressed and taken into account, such as freedom of information, data protection, human rights and democracy.

The digital object in this declaration, is any object that has been created with a computer, be it originally or after conversion (digitisation), and that has to be preserved for a certain period.

Objective

This initiative has the following objectives:

- It intends to mobilize actors from different communities and with different interests in preserving digital information.
- It aims to achieve co-ordination of all efforts that are undertaken in this area by different actors and stakeholders, so they can be more focussed in order to achieve more synergy, to avoid redundancy, and to achieve cost-effectiveness. The result should be the creation of an effective infrastructure for collaboration by connecting different networks, institutions and individuals that are working in this field.
- It intends to focus stakeholders on issues that desperately need attention in this area. The underlying assumption being that action has to be taken at conception rather than at secondary stages.
- After having identified the actors, the different communities, and the relevant issues it can and will serve as a basis for directing towards areas of activity and to establish priorities.
- The achievement of a network of well managed and firmly underpinned preservation policies, programmes, and activities will create a basis of knowledge that can foster new economic opportunities through creativity, support effectively the emerging knowledge economy and maintain and exploit the intellectual capital created by the different communities.
- It will strongly encourage and promote the use of open standards (and open source software), so long term needs can be served in a better way.

Benefits

Participation in this initiative should enable organisations or individuals to:

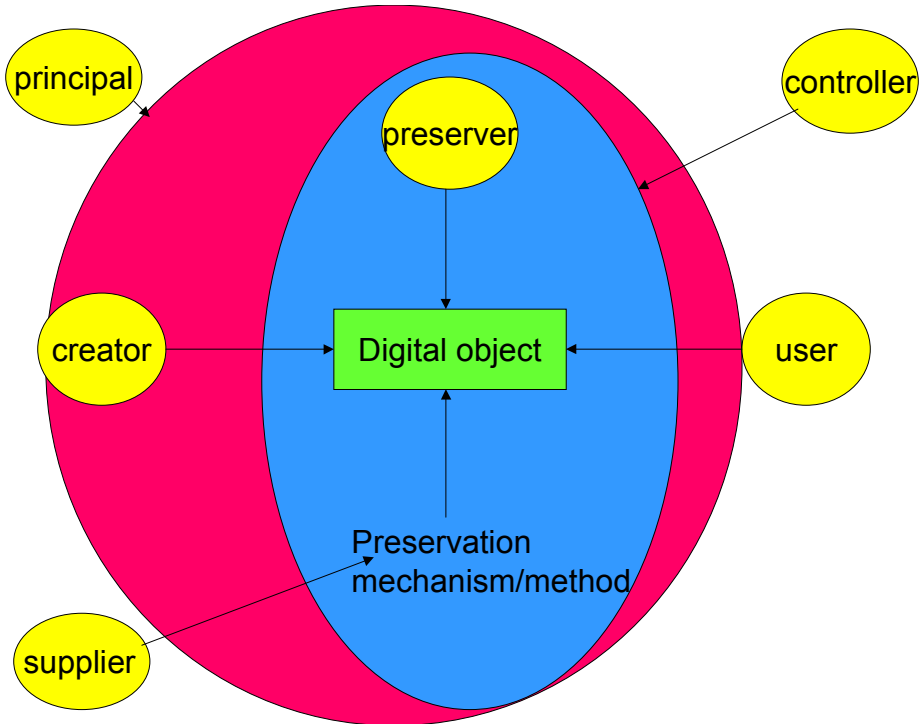
- Achieve better risk management (e.g. prevention of loss of intellectual capital, liability).
- Participate in a common framework for benchmarking digital access and preservation practice (efficient and effective; e.g. right sized for problem organisation).
- Participate in a platform for sharing knowledge (e.g. practices, methods, typologies, evaluation criteria).
- Use the platform as a mechanism for measuring competitive advantage.
- Build new partnerships e.g. for further research.
- Enhance the awareness among the main players in the digital object chain (DOC), i.e. principals, creators, suppliers and users .
- Unlock the e-value of the intellectual capital they possess.
- Achieve synergy and avoid redundancy (e.g. limited resources).
- Optimise the quality (and quantity) of interaction between the players in the digital object chain
- Maximise efforts in preservation.

Audience/roles

In order to be able to achieve the above-mentioned objectives it will be necessary to understand the roles that different actors play or may play in digital preservation. This charter does not address any distinct community in particular, but concerns all individuals and organisations that are responsible for or have an interest in digital information and emphasise the cross-sectoral approach that must be taken.

The following chain of actors can de distinguished in the following model: principals, suppliers, creators, preservers, controllers, and users.

Figure 1: Multidimensional view of the Digital Object Chain



Suppliers are all those individuals or organisations that provide and/or design and/or develop (software) tools for authoring, creating, communicating, preserving, searching, providing, and disseminating digital information.
Examples: software-vendors and -developers, IT-specialists, computer scientists, IT-researchers .

Creators are individuals and/or organisations that author, generate, or create digital information in the course of their work, as professionals in creative and/or entertainment industries, or in any other capacity.
Examples: (individuals in) business companies, government organisations, artists, scientists, researchers, cultural heritage institutions.

Preservers include every individual or organisation that has a responsibility for managing and preserving digital information, regardless of form, be it as custodian or as owner.
Examples: business companies, government organisations, memory organisations (e.g. libraries, archives, museums), research institutions, individual researchers.

Controllers include all individuals or organisations that have a responsibility to monitor and check the quality, efficiency, cost-effectiveness, and effectiveness of the management, preservation, security, and accessibility of digital information.
Examples: auditors, financial controllers, members of parliament, certifying organisations.

Users include all individuals or organisations that have an interest in using digital information.
Examples: scientists, historians, the public, journalists, members of parliament.

Principals include all persons that are enabling and/or assigning the creation of digital entities and the development of systems that will support that. This includes policymakers. They act mostly within the area of organisations that may involve both creators and preservers (red circle), but in the case they

are policymakers they could be involved with the whole field (and all actors). They could also only be responsible for the preservation part (blue circle).
Examples: CEO's, CIO's, information managers, program managers, project leaders, policymakers, cabinet (ministers), individuals.

With respect to the categories of principals, creators, preservers and users, the same individuals or organisations can exercise more than one role. The context in which individuals or organisations work or act determines who will play what role. In different contexts one actor can play different roles.

The basic interrelationship is the chain of creator, preserver and user. Principals, suppliers and controllers can interact at any moment with each component of this chain (see Figure 1). The whole can be identified as the digital object chain (**DOC**).

Principles

Each organisation should be aware of the following principles and use them in defining policies that include digital objects:

1. Preservation of digital information is a major challenge that requires collaboration between organisations and persons involved both in their creation and their management.

2. Preservation starts from the very beginning, i.e. the design of systems that will support the creation of digital entities. Subsequently it will encompass the whole life cycle of these entities.

3. It is necessary to have a clear understanding of the different roles that are involved in preserving digital information in order to identify requirements and responsibilities.

4. Preservation has to be an integral part of any policy and strategy developed and implemented that includes the use of IT and subsequently the creation of digital entities, such as digitalisation of analog objects, e-government and/or electronic services, cultural heritage programs that enable access through internet, etc.

5. Preservation strategies and methods should be integrated in all activities and/or systems that author, create, and use digital information/objects. Adequate preservation management includes:

    a setting policies and standards;

    b identifying and assigning responsibilities;

    c identifying requirements and establishing procedures; and,

    d designing, implementing, and controlling strategies, methods and/or systems that enable preservation

    It should ensure that digital information or objects can easily be exchanged, enriched, accessed and disseminated when needed.