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## Part One

# An Overview of Federal Historic Preservation Law 1966 - 1996

# I. Introduction

## A. Background

Thirty years after passage of the National Historic Preservation Act of 1966 (NHPA), Federal law clearly reflects the Nation's commitment to preserving and protecting its wealth of historic resources. This was not always the case. Although Federal statutes containing preservation policies have existed since the turn of the 20th century, these laws typically were limited in scope and lacked effective means of enforcement.

The earliest Federal preservation statute was the Antiquities Act of 1906, which authorized the President to set aside historic landmarks, structures, and objects located on lands controlled by the United States as national monuments.[1] It required permits for archeological activities on Federal lands, and established criminal and civil penalties for violation of the act. The Historic Sites Act of 1935 was the second major piece of Federal historic preservation legislation.[2] This act declared it national policy to preserve for public use historic sites, buildings, and objects of national significance and directed the Secretary of the Interior to conduct various programs with respect to historic preservation.[3] Although these statutes were significant, they did not create a national awareness of the need for preservation or provide a means to incorporate preservation concerns into Federal agency programs.

In 1964, the United States Conference of Mayors undertook a study of historic preservation in the United States. The resulting report, "With Heritage So Rich," revealed a growing public interest in preservation and the need for a unified approach to the protection of historic resources.[4] This report influenced Congress to enact a strong new statute establishing a nationwide preservation policy: the National Historic Preservation Act of 1966.[5]

The National Historic Preservation Act was a watershed in preservation law, for it created a means by which the Nation's preservation goals could be achieved. Recognizing that increased knowledge and better administration of historic resources would improve the planning and execution of Federal undertakings and benefit economic growth and development nationwide,[6] the act promoted the use of historic properties to meet the contemporary needs of society. It directed the Federal Government, in cooperation with State and local governments, Native Americans, and the public, to take a leadership role in preservation. Since 1966, Congress has strengthened national preservation policy further by recognizing the importance of preserving historic aspects

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[1]16 U.S.C. §§ 431-433 (1994).

[2]16 U.S.C. §§ 461-467 (1994).

[3]Under the act's authority, the Secretary of the Interior established the National Historic Landmark Program, under which properties of national significance are designated as National Historic Landmarks.

[4]Special Committee on Historic Preservation, U.S. Conference of Mayors, "With Heritage So Rich" (1966).

[5]16 U.S.C. §§ 470-470w-6 (1994).

[6]16 U.S.C. § 470(b)(6) (1994).

of the Nation's heritage in several other statutes—among them the National Enviornmental Policy Act[7] and several transportation acts[8]—and by enacting statutes directed toward the protection and preservation of archeological resources.[9] These laws require Federal agencies to consider historic resources in their planning and decisionmaking and, although they are not co-extensive with NHPA, often overlap with the provisions of NHPA.

The Executive Branch has expressed its support for preservation through several key Executive Orders. In 1971, for example, President Nixon signed Executive Order No. 11593, which instituted procedures Federal agencies must follow in their property management activities.[10] In 1996, President Clinton signed another important Executive Order, this one setting forth the Administration's support for locating Federal offices and facilities in historic districts and properties in the Nation's inner cities: Executive Order No. 13006 directs Federal agencies to use and rehabilitate properties in such areas wherever feasible and reaffirms the commitment to Federal leadership in the preservation of historic properties set forth in NHPA thirty years before.[11] Another 1996 Executive Order, No. 13007, expresses support for the protection of Native American sacred sites.[12]

The National Historic Preservation Act and other preservation statutes, as well as the Executive Orders mentioned above, have clarified and refined the duties and responsibilities of Federal agencies with regard to the protection of America's cultural heritage. Federal compliance with these authorities, however, has not always been consistent, giving rise to a number of lawsuits brought primarily by citizens and preservation organizations. The resulting court opinions interpret and elucidate the historic preservation provisions of these laws.

## B. Scope of Report

This report contains summaries of those opinions, as well as an overview of Federal historic preservation law from 1966 to 1996 to put them in context. It presents an objective review of the case law addressing NHPA and its implementing regulations in addition to preservation-related Executive Orders and other Federal statutes dealing with historic preservation. It also addresses various procedural questions involved in preservation

[7]42 U.S.C. § 4331(b)(4)(1994); *see* 40 C.F.R. § 1502.16(g), 1508.27(b)(3), (8) (1995).

[8]The Federal-Aid Highway Act of 1966, Pub. L. No. 89-574, 80 Stat. 766 (1966) (codified at 23 U.S.C. § 138 (1994)) and the Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966) (codified at 49 U.S.C. § 303 (1994)). The Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991) (codified at 23 U.S.C. §§ 101(a) and 133 (1994)), requires that at least 10 percent of funds apportioned to a State for its Surface Transportation Program be used for "transportation enhancement activities," which include historic preservation projects, as well as other environmentally beneficial activities.

[9]*See* Historical and Archeological Data Preservation Act of 1974, 16 U.S.C. §§ 469-469c (1994); Archeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470*mm* (1994); Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013 (1994).

[10]Exec. Order No. 11,593, 3 C.F.R. 154 (1971), *reprinted in* 16 U.S.C. § 470 note (1994).

[11]Exec. Order No. 13,006, 61 Fed. Reg. 26,071 (1996).

[12]Exec. Order No. 13,007, 61 Fed. Reg. 26,711 (1996).

litigation. This report covers all cases that involve the National Historic Preservation Act and summarizes claims brought under the act and any other preservation-related claims those cases may contain.[13]

# II. The National Historic Preservation Act

## A. Purpose and Structure

The National Historic Preservation Act expresses a general policy of supporting and encouraging the preservation of prehistoric and historic resources for present and future generations, directing Federal agencies to assume responsibility for considering such resources in their activities.[14] NHPA does not mandate preservation of such resources but requires Federal agencies to consider the impact of their actions on historic properties. The statute sets forth a multifaceted preservation scheme to accomplish these policies and mandates at the State and Federal levels.

The act first authorizes the Secretary of the Interior to expand and maintain a National Register of Historic Places,[15] an inventory of districts, sites, buildings, structures, and objects significant on a national, State, or local level in American history, architecture, archeology, engineering, and culture. It is up to the Secretary to list properties in the National Register and to determine the eligibility of properties for listing using published criteria and procedures.[16] Listing in the Register qualifies a property for Federal grants,[17] loans,[18] and tax incentives.[19]

Second, NHPA encourages State and local preservation programs. States may prepare and submit to the Secretary of the Interior programs for historic preservation, which the Secretary must approve if they provide for the designation of a State Historic Preservation Officer (SHPO) to administer the State preservation program; establish a State historic preservation review board; and provide for adequate public participation in the State program.[20] The SHPO must identify and inventory historic properties in the State; nominate eligible properties to the National Register; prepare and implement a statewide historic preservation plan; serve as a liaison with Federal agencies on preservation matters; and provide public information, education, and technical assistance.[21]

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[13]This report does not include NHPA cases that resulted in settlements rather than court opinions.

[14]16 U.S.C. §§ 470, 470-l (1994).

[15]16 U.S.C. § 470a(a)(1)(A) (1994).

[16]36 C.F.R. pts. 60, 63 (1995).

[17]16 U.S.C. §§ 470a, 470b (1994).

[18]16 U.S.C. § 470d (1994).

[19]*See* 26 U.S.C. §§ 170(h)(4)(A)(iv), 170(h)(4)(B) (1994).

[20]16 U.S.C. § 470a(b)(1) (1994).

[21]16 U.S.C. § 470a(b)(3) (1994).

Although the organization of the State programs and the actual roles of the SHPOs may differ from State to State, the provisions of NHPA have influenced States' administrative structures. For example, most State governments now undertake comprehensive survey and planning activities and retain professional staff with preservation expertise to oversee State activities affecting historic properties. Many States have certified local governments to carry out preservation activities[22] and, since NHPA was amended in 1992, Indian tribes may now assume all or part of the functions of a SHPO with respect to tribal lands.[23]

NHPA also authorizes a grant program, supported by the Historic Preservation Fund, to provide monies to States for historic preservation projects and to individuals for the preservation of properties listed in the National Register.[24] The grant program provides for two categories of grants: one for survey and planning purposes, which provides essential financial support for administering each State program; the other for "bricks and mortar" preservation or rehabilitation of historic properties. States and other grant recipients must match the Federal funds. Through the Historic Preservation Fund, in 1995 the Federal Government gave States $30,940 million to carry out preservation-related activities.[25]

Finally, NHPA established the Advisory Council on Historic Preservation, which is now an independent Federal agency.[26] Composed of 20 members from both the public and private sectors,[27] the Council employs a professional staff trained in many aspects of preservation. Council members include the Secretaries of the Interior and Agriculture and four other Federal agency heads designated by the President; the Architect of the Capitol; four members of the general public; a Native American or Native Hawaiian; four historic preservation experts; one governor; and one mayor, all appointed by the President. The chairman of the National Trust for Historic Preservation and the president of the National Conference of State Historic Preservation Officers serve as ex officio members.[28] NHPA directs the Council to advise the President and Congress on historic preservation matters, review the policies and programs of Federal agencies to improve their consistency with the purposes of the act, conduct training and educational programs, and encourage public interest in preservation.[29] Most importantly, the act places the Council in the central role of administering and participating in the preservation review process established by Section 106.[30]

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[22]16 U.S.C. § 470a(c) (1994); 36 C.F.R. pt. 61 (1995).

[23]16 U.S.C. § 470(a)(d)(2) (1994).

[24]16 U.S.C. § 470a(e) (1994).

[25]FY 1995 Historic Preservation Fund Appropriation, National Park Service, Heritage Preservation Service Program.

[26]16 U.S.C. § 470i (1994).

[27]16 U.S.C. § 470i(a) (1994).The size and composition of the Council has been periodically adjusted.

[28]16 U.S.C. § 470i (1994).

[29]16 U.S.C. § 470j (1994).

[30]16 U.S.C. § 470 (1994).

## B. Legislative History

The act has been amended several times since its inception in 1966, each time strengthening and clarifying various aspects of the law. Significant amendments occurred first in 1976 when Congress established the Historic Preservation Fund as the source of matching grants to States and to the National Trust for Historic Preservation to carry out historic preservation activities.[31] The 1976 amendments also extended the application of Section 106 to include properties eligible for listing on the National Register, not just those already listed. Of great importance to the Council, the 1976 amendments rendered it an independent Federal agency; previously, it had been staffed and supported through the National Park Service.

NHPA changed significantly again in 1980 when Congress added Section 110, which directed Federal agencies to assume more responsibility for the stewardship and protection of historic properties they owned or controlled.[32] The 1980 amendments also better articulated the duties of SHPOs, provided for the certification of local government preservation programs and for local government participation in National Register nominations and the Section 106 process itself. The Council's duties were expanded as well to include the evaluation of Federal agencies' historic preservation programs.

Congress amended NHPA most recently in 1992,[33] providing a greater role for Native Americans and Native Hawaiians in Federal and State preservation programs,[34] requiring Federal agencies to establish their own internal procedures to incorporate historic preservation planning into agency programs,[35] and obligating Federal agencies to withhold Federal assistance in cases of anticipatory demolition.[36] The amendments also set forth more specific measures to withhold confidential information about the location of historic properties,[37] specify the responsibilities of Federal agencies that receive formal comment from the Council,[38] and clarify several key terms, among them "undertaking," "State," and "Indian tribe."[39] Although the 1992 amendments did not directly amend the language of Section 106 of NHPA, the new provisions significantly affect the Section 106 compliance process.

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[31]Pub. L. No. 94-222, 90 Stat. 1320 (1976) (codified at 16 U.S.C. § 470a(e)(1)-(2) (1994)).

[32]Pub. L. No. 96-515, 94 Stat. 2987 (1980) (codified at 16 U.S.C. § 470h-2 (1994)).

[33]Pub. L. No. 102-575, 106 Stat. 4753 (1992).

[34]16 U.S.C. §§ 470a(d) and 470w(4) (1994).

[35]16 U.S.C. § 470h-2(a)(2) (1994).

[36]16 U.S.C. § 470h-2(k) (1994).

[37]16 U.S.C. § 470w-3 (1994).

[38]16 U.S.C. § 470h-2(*l*) (1994).

[39]16 U.S.C. § 470w (1994).

## C. Key Statutory Provisions: Sections 106 and 110

### 1. Section 106

The Council's most significant involvement in the Federal preservation process is through Section 106 of NHPA.[40] Section 106 provides that:

> 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.[41]

Section 106 requires each Federal agency[42] to do two things prior to carrying out, approving financial assistance to, or issuing a permit for a project that may affect properties listed or eligible for listing in the National Register of Historic Places. First, the agency must consider the impact of the project on historic properties. Second, the agency must seek the Council's comments on the project. Section 106 originally applied only to properties actually listed in the National Register; however, in 1976, Congress extended its provisions to properties not yet listed but still meeting the criteria.[43] Much of the Council's daily work involves commenting in response to agency requests under Section 106.[44] To administer these requests under the authority granted by Congress,[45] the Council has issued regulations to govern agencies' compliance with Section 106.[46] These regulations set forth procedures, known as the "Section 106 process" that explain how Federal agencies must take into account the effects of their actions on historic properties and how the Council will comment on those actions.[47]

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[40]16 U.S.C. § 470f (1994).

[41]*Id.*

[42]If a State or local agency is acting pursuant to a delegation, then that agency is required to comply with Section 106 as if it were a Federal agency. *See* 16 U.S.C. § 470w(7)(D) (1994); 36 C.F.R. § 800.2(b) (1995).

[43]Pub. L. No. 94-422, § 201, 90 Stat. 1313 (1976).

[44]In 1995, the Council received approximately 3,500 requests for comment.

[45]16 U.S.C. § 470s (1994).

[46]36 C.F.R. pt. 800 (1995).

[47]In 1992 Congress gave the Council specific authority, in Section 211, to implement Section 106 in its entirety. 16 U.S.C. § 470s (1994). Prior to that time, some agencies interpreted the Council's authority as being limited to implementing regulations only on how the Council would comment on undertakings.

## 2. Section 110

Section 110 of NHPA governs Federal agency programs by providing for consideration of historic preservation in the management of properties under Federal ownership or control. Originally a codification of Executive Order No. 11593, Section 110 established special preservation responsibilities for Federal agencies with an emphasis on property management activities.[48] Section 110 does not replace or invalidate Executive Order No. 11593, but rather supplements it.

As passed in 1980, Section 110 established procedures for Federal agencies managing or controlling property. Among other things, agencies must assume responsibility for the preservation of historic properties under their jurisdiction and, to the maximum extent feasible, use historic properties available to the agency.[49] Additionally, Federal agencies were directed to carry out their programs and projects in accordance with the purposes of NHPA.[50] Further, Section 110(f) requires that, prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark,[51] agencies must undertake such planning and action as may be necessary to minimize harm to the landmark and obtain Council comments on the undertaking.[52] The review required by Section 110(f) is similar to that required under Section 106 but involves a higher standard of care. Generally, Section 110(f) review is accomplished under the Council's procedures implementing Section 106.

The 1992 amendments to NHPA added greater Federal agency responsibility for consideration of historic properties during agency decisionmaking.[53] The amended Section 110 requires each Federal agency to establish a historic preservation program. The program must provide for the identification and protection of the agency's historic properties; ensure that such properties are maintained and managed with due consideration for preservation of their historic values; and contain procedures to implement Section 106, which must be consistent with the Council's regulations.[54] Specifically, the amendments explain that such procedures must provide a process for the identification and evaluation of historic properties for listing in the National Register and the

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[48]16 U.S.C. § 470h-2 (1994).

[49]16 U.S.C. § 470h-2(a)(1) (1994).

[50]16 U.S.C. § 470h-2(d) (1994).

[51]A National Historic Landmark is a property of national historic significance. All landmarks are designated by the Secretary of the Interior under the Historic Sites, Buildings, and Antiquities Act of 1935, 16 U.S.C. §§ 461-467 (1994), and are listed in the National Register as a result of Section 101 of the National Historic Preservation Act, 16 U.S.C. § 470a(a)(1)(B) (1994). *See also* 36 C.F.R. pt. 85 (1995).

[52]16 U.S.C. § 470h-2(f) (1994).

[53]16 U.S.C. § 470h-2(a)(2), (k), (*l*) (1994).

[54]16 U.S.C. § 470h-2(a)(2) (1994).

development of agreements in consultation with SHPOs, local governments, Native Americans and Native Hawaiians and the interested public.[55]

Congress also added a new provision that directs Federal agencies to withhold grants, licenses, approvals, or other assistance to applicants who intentionally significantly and adversely affect historic properties.[56] This provision, known as the "anticipatory demolition" section, is designed to prevent applicants from destroying historic properties prior to seeking Federal assistance in an effort to avoid the Section 106 process. Finally, the 1992 amendments to Section 110 add the responsibility that the head of a Federal agency, without delegation, must document any decision under Section 106 where a Memorandum of Agreement has not been executed. This provision ensures a high level of Federal agency review where there is a failure to reach an agreement and, thus, strengthens the incentives for agencies to sign MOA.[57] The amendments also codified a provision of the Council's regulations stating that an MOA will govern implementation of the undertaking in a binding manner[58]

The Secretary of the Interior, in consultation with the Advisory Council, is responsible for developing guidelines to implement the requirements of Section 110 of the act.[59] The Council and the National Park Service jointly issued guidelines in 1989[60] and new guidelines are under development to address the 1992 amendments to NHPA.

## III. Section 106 Implementing Regulations

The National Historic Preservation Act authorizes the Council to issue regulations—as opposed to guidelines—to implement Section 106.[61] These regulations structure a process through which Federal agencies must take into account the effects of their undertakings on historic properties and afford the Council an opportunity to comment. The Council has revised its regulations once (in 1986) since their first promulgation in 1979 and is currently revising them again. Following the regulations, Federal agencies collect information regarding the impacts of their actions and decisions on historic properties; consult with stakeholders to seek ways

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[55] 16 U.S.C. § 470h-2(a)(2)(E)(ii) (1994).

[56] 16 U.S.C. § 470h-2(k) (1994). This provision does allow assistance if, after consultation with the Council, the Federal agency determines that circumstances justify granting the assistance.

[57] 16 U.S.C. § 470h-2(*l*) (1994).

[58] *Id.*

[59] 16 U.S.C. § 470a(g) (1994). In addition, the Secretary of the Interior must consult with the Secretaries of Agriculture and Defense, the Smithsonian Institution, and the Administrator of GSA to develop specific standards for the preservation of federally owned and controlled properties. 16 U.S.C. § 470a(h) (1994).

[60] 53 Fed. Reg. 4,727 (Feb. 17, 1988).

[61] 16 U.S.C. § 470s (1994).

to mitigate or avoid any adverse effects; and resolve the adverse effects through consultation that considers the interests of the stakeholders.

## A. Current Regulations

In 1986 the Council promulgated its most recent regulations. The regulations provide that when a Federal agency determines that its actions will fall within the definition of an undertaking as defined by NHPA and the Council's regulations,[62] it must first consult with the State Historic Preservation Officer from the State(s) in which the undertaking will have an effect. This step helps the agency identify all properties listed in or eligible for the National Register that may be affected by its undertaking.[63] Eligible properties include all properties that meet the criteria of eligibility[64] for the National Register, even if the properties have not been formally determined eligible by the Secretary of the Interior or other official.[65] As part of the identification effort, the Federal agency must solicit the views of public and private organizations, Native Americans, local governments and others likely to have knowledge of, or concerns with, the historic properties.[66] Agencies may pursue identification through a variety of means, including literature searches and field surveys.[67] The agency, in consultation with the SHPO, applies the National Register criteria to assess the eligibility of identified properties. The agency and the SHPO can agree or stipulate that the property is eligible and continue the Section 106 process.[68] Alternatively, if there is disagreement, the agency must ask the Secretary of the Interior to make a formal determination of the property's eligibility.[69]

The agency, in consultation with the SHPO, must next determine the nature of the effect its undertaking will have on any historic properties it has identified.[70] If there is no effect, the agency may proceed with the project after notifying the SHPO and receiving no objection within 15 days of notification.[71] If there is an effect but it

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[62]16 U.S.C. § 470w(7) (1994); 36 C.F.R. § 800.2(o) (1995).

[63]36 C.F.R. § 800.4(a) (1995).

[64]36 C.F.R. § 60.4 (1995).

[65]36 C.F.R. § 800.2(e) (1995); Boyd v. Roland, 789 F.2d 347 (5th Cir. 1986); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985); Hough v. Marsh, 557 F. Supp. 74 (D. Mass. 1982). *See also* Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995).

[66]36 C.F.R. § 800.4(a)(1)(1995).

[67]36 C.F.R. § 800.4(a)(2), (b) (1995).

[68]36 C.F.R. § 800.4(c)(2) (1995). The agency may complete the Section 106 process prior to seeking a determination of eligibility from the Secretary.

[69]36 C.F.R. § 800.4(c)(4) (1995).

[70]36 C.F.R. § 800.5 (1995).

[71]36 C.F.R. § 800.5(b) (1995).

is not adverse, the agency makes a determination of no adverse effect and either obtains the SHPO's concurrence and advises the Council of its finding, with supporting documentation, or advises the Council of its finding, with supporting documentation, and notifies the SHPO. Providing the Council does not object, the agency is deemed to have satisfied its Section 106 responsibilities and may proceed with the undertaking.[72] If there will be an adverse effect on the historic properties, the agency notifies the Council and enters into a consultation process with the SHPO and, where appropriate, the Council.[73]

Under this consultation process, the agency, the Council, if participating, and the appropriate SHPO(s) negotiate to reach agreement on means to avoid or mitigate the adverse effects of the undertaking.[74] If they are successful, they execute a Memorandum of Agreement (MOA),[75] a written agreement among the parties that sets out the agreed-upon measures. The MOA is analogous to a binding, enforceable contract, and it governs implementation of the undertaking.[76]

When entire Federal programs are involved or when a project is complex, an agency may choose to negotiate a Programmatic Agreement (PA).[77] A PA covers ongoing and future activities undertaken as part of the program it addresses, affording a Federal agency flexibility in adapting the normal Section 106 procedures to its specific needs. When an activity falls within the scope of a PA, the agency is not required to seek additional comments from the Council before proceeding, since a PA signed by the Council governs implementation of the program.[78]

The Council resolves the vast majority of undertakings it reviews through negotiation, reaching solutions that have no adverse effect on historic properties or agreements detailing how adverse effects will be avoided, mitigated, or accepted. In the unusual event that the parties cannot reach an agreement, the Federal agency must request formal comments from the Council, prior to making its decision. The Council membership then reviews the case and issues advisory comments on the undertaking within 60 days.[79] The agency considers the Council's comments and reaches a final decision on the undertaking. The head of the Federal agency must document the decision, and may not delegate this responsibility.[80]

[72]36 C.F.R. § 800.5(d) (1995).

[73]36 C.F.R. § 800.5(e) (1995).

[74]36 C.F.R. § 800.5(e) (1995).

[75]36 C.F.R. § 800.5(e)(4) (1995).

[76]16 U.S.C. § 470h-2(*l*) (1994); 36 C.F.R. § 800.6(c)(1) (1995)

[77]36 C.F.R. § 800.13 (1995).

[78]36 C.F.R. § 800.13(e) (1995).

[79]36 C.F.R. § 800.6(b) (1995). Failure to reach agreement generally occurs less than a half-dozen times each year.

[80]16 U.S.C. § 470h-2(*l*) (1994).

## B. Proposed Regulations

On September 13, 1996, the Council published in the *Federal Register* proposed regulations to streamline the Section 106 process and implement the 1992 amendments to the National Historic Preservation Act and the Administration's "Reinventing Government" initiative. The proposed regulations would change the overall Section 106 process by removing the effect determination step and proceeding directly to an assessment of adverse effects on historic properties; providing alternative procedures for Federal agencies to follow under certain circumstances; and withdrawing the Council from routine case-by-case review. In general, the proposed regulations would delegate more discretion and flexibility to Federal agencies and SHPOs to work out agreements under Section 106. The proposal would allow for more tailoring of Section 106 obligations based on the project's importance, the historic property's significance, and the nature of the impact. The process would be streamlined through the use of standard treatments for adverse effects, categorical exemptions, programmatic comments, flexible identification requirements, and Programmatic Agreements. The proposed regulations would also encourage better coordination with the environmental review process conducted under the National Environmental Policy Act. In fulfilling documentation requirements, Federal agencies could use environmental assessments and environmental impact statements for Section 106 purposes, as long as certain criteria are met. The proposed regulations also include a new section on Native American involvement in the Section 106 process, which implements the 1992 amendments by setting forth the rights of Native Americans and the duties of Federal agencies to seek Native American participation.

# IV. Court Opinions on Compliance with Section 106 and the Council's Regulations

The preponderance of historic preservation case law since 1966 involves compliance with Section 106 of NHPA. The courts have addressed two broad areas: first, whether Section 106 applies at all in a given case, and second, whether an agency has complied with Section 106 and the Council's regulations.

## A. Applicability of Section 106

The existence of a Federal undertaking is the trigger for Section 106 compliance. In deciding cases involving alleged violations of the National Historic Preservation Act, courts often focus their inquiry on several threshold questions: 1) To whom does Section 106 apply? 2) To what sorts of actions does it apply? 3) At what time does Section 106 apply? 4) To what properties does Section 106 apply?

### 1. Section 106 applies to Federal agencies

Section 106 requires the "head of any Federal agency" to comply with its provisions. Cabinet-level departments, such as the Department of the Interior or the Department of Housing and Urban Development; their subagencies, such as the Army Corps of Engineers or the Forest Service of the Department of Agriculture; and independent agencies, such as the Federal Energy Regulatory Commission, must all comply. Routinely, responsibility for compliance is delegated from the agency head to regional officials and project managers.

Section 106 applies only to Federal agencies, not to State or local governments unless they are acting as the "Federal agency" under a specific Federal law.[81] NHPA does not apply to private entities or individuals.[82]

Defining what is a Federal agency generally presents no problem. The question becomes complicated, however, when entities with both Federal and private attributes, such as federally created corporations, are involved. To determine whether an entity is, in fact, a Federal agency, the courts examine that entity's enabling statute to discover its structure, financing, authorities, and responsibilities. The corporation's enabling statute often specifies that the corporation is not a Federal agency.[83] If not, the courts balance the entity's "Federal" aspects with its "private" attributes to decide whether Congress intended the entity to be considered a Federal agency required to comply with Federal preservation laws.

For example, one court found a Federal Reserve bank to be an agency subject to NHPA, despite the fact that Federal Reserve banks operate as private corporations in many respects.[84] Noting that the bank was a fiscal arm of the Federal Government, created and operated in furtherance of national policy, the court was convinced that the bank was a Federal agency. Some entities, like the Federal Deposit Insurance Company (FDIC) and the now defunct Resolution Trust Corporation, have enabling statutes that provide dual roles. The Federal Deposit Insurance Act defines different functions for FDIC, including those of corporation, receiver, and conservator. When FDIC is acting as a receiver, the enabling statute prevents courts from hearing suits that would restrain its exercise of functions or powers. At least one court has interpreted this provision to bar suits to enjoin demolition of a historic property because FDIC was, in this instance, acting as a receiver, not in its corporate capacity.[85]

When there has been no judicial ruling on whether an entity must comply with NHPA, it is useful to examine opinions handed down under other related statutes. For example, the United States Postal Service has been found to be an agency for purposes of the National Environmental Policy Act.[86] Application of the principles expressed in this opinion would render the Postal Service subject to Section 106 as well.

Section 104(f) of the Housing and Community Development Act (HCDA) allows local governments to act legally as Federal agencies for purposes of compliance with environmental statutes, including NHPA.[87] Under HCDA, the Department of Housing and Urban Development awards block grants to local governments. The act

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[81] *See, e.g.*, 42 U.S.C. § 5304 (1994); 16 U.S.C. § 470w(7)(D) (1994).

[82] Vieux Carré Property Owners, Residents & Assocs. v. Brown, 875 F.2d 435 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990); Ely v. Velde (Ely I), 451 F.2d 1130 (4th Cir. 1971).

[83] *See* Miltenberger v. C. & O. Ry., 450 F.2d 971 (4th Cir. 1971) (AMTRAK not a Federal agency).

[84] Committee to Save the Fox Bldg. v. Birmingham Branch of the Fed. Reserve Bank, 497 F. Supp. 504 (N.D. Ala. 1980).

[85] National Trust for Historic Preservation v. Federal Deposit Ins. Corp., 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). *But see* Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993) (FSLIC, predecessor to FDIC, entered into MOA when it acquired historic property from distressed financial institution).

[86] Chelsea Neighborhood Ass'n v. United States Postal Serv., 516 F.2d 378 (2d Cir. 1975).

[87] 42 U.S.C. § 5304 (1994). Similar authorities are found in other HUD programs.

explicitly designates the grant recipient as the "Federal agency,"[88] and the regulations implementing HCDA specifically state that in order to receive funding, the recipient must carry out HUD's environmental review procedures.[89] Thus, where such a grant is involved, the local government grant recipient is responsible for meeting the requirements of Section 106. The Council's regulations define "agency official" to include local governments when they are acting pursuant to a delegation.[90]

A Federal agency may authorize the participation of non-Federal entities in complying with the Council's preliminary requirements and in considering historic resources during the planning of an undertaking. However, the agency retains ultimate responsibility for Section 106 compliance; it may not simply "rubber-stamp" the work of other participants.[91] In one case, for example, the court found that the Federal Highway Administration (FHWA) had improperly delegated to a State its NHPA responsibilities for a highway project. Although the State could participate in the review process, FHWA was responsible for the required studies, reports, evaluation, and determinations of effect and, ultimately, for compliance with Section 106.[92] Agencies often require applicants for Federal licenses, permits, approvals or other assistance to conduct various steps of the Section 106 process.[93] However, the statutory language of Section 106, as well as the Council's regulations, make it clear that Section 106 is a Federal agency responsibility. Courts have determined that Federal agencies may not delegate their own responsibilities to independently assess the environmental impact of their actions or proposals subject to Federal agency approval.[94] Indeed, Federal agencies are subject to suit when they exclusively rely on applicants and do not independently ensure that historic properties were properly considered; such reliance on applicants is at the Federal agency's own risk.[95]

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[88]*See* North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992); Natural Resources Defense Council v. City of New York, 528 F. Supp. 1245 (S.D.N.Y. 1981), *aff'd*, 672 F.2d 292 (2d Cir.), *cert. dismissed*, 456 U.S. 920 (1982); 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).

[89]24 C.F.R. § 570.200(a)(4) (1995).

[90]36 C.F.R. § 800.2(b) (1995); *see also* 16 U.S.C. § 470w(7)(D) (1994).

[91]36 C.F.R. § 800.1(c)(1)(i) (1995); Citizens' Defense Fund v. Gallagher, [1979] 9 Envtl. L. Rep. (Envtl. L. Inst.) 20,420 (D. Mont. Nov. 3, 1978).

[92]Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978).

[93]El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991); Illinois Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied,* 488 U.S. 1004 (1989).

[94]*Id.*

[95]El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991) (Rural Electrification Administration subject to suit when rural cooperative on which it relied failed to properly carry out Section 106 obligations).

### 2. Section 106 applies to Federal undertakings

Federal agencies must comply with Section 106 when they directly undertake Federal activities and when they are involved indirectly through funding, approving, permitting or licensing. Federal agencies also must comply with Section 106 when there are indirectly involved by delegating a Federal program under which State or local agencies issue permits. The 1992 amendments to NHPA specifically defined the term undertaking as "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."[96] The Council's current regulations define undertaking as:

> 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.[97]

Although the proposed regulations would change the current regulatory definition to track the exact language in the statute, the Council has taken the position that its current regulatory definition of undertaking is broad enough to encompass the 1992 definition.

The courts have applied Section 106 to a wide variety of direct Federal undertakings, such as military operations,[98] building leases,[99] construction of refugee camps,[100] dam construction,[101] building demolition,[102] land

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[96]16 U.S.C. § 470w(7) (1994).

[97]36 C.F.R. 800.2(o) (1995).

[98]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 on other grounds sub nom.* Weinberger v. Barcelo, 456 U.S. 305 (1982) (Navy bombing); 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) (Navy bombing). *See also* Catholic Action of Hawaii/Peace Educ. Proj. v. Brown, 468 F. Supp. 190 (D. Hawaii 1979), *rev'd on other grounds*, 643 F.2d 569 (9th Cir. 1980), *rev'd sub nom.* Weinberger v. Catholic Action of Hawaii/Peace Educ. Proj., 454 U.S. 139 (1981) (Navy munitions facility).

[99]Birmingham Realty Co. v. General Servs. Admin., 497 F. Supp. 1377 (N.D. Ala. 1980).

[100]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).

[101]West Branch Valley Flood Protection Ass'n v. Stone, 820 F. Supp. (D.D.C. 1993); Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

[102]Committee to Save the Fox Bldg. v. Birmingham Branch of the Fed. Reserve Bank, 497 F. Supp. 504 (N.D. Ala.1980); Don't Tear It Down, Inc. v. General Servs. Admin., 401 F. Supp. 1194 (D.D.C. 1975).

exchange agreements,[103] solarization of lighthouses,[104] construction of fences and livestock watering facilities,[105] and land management activities.[106] Federal agency regulatory revisions are also another category of direct undertakings falling under Section 106.[107]

An interesting question that received a fair amount of judicial attention in the 1970s and 1980s involves the Government's NHPA responsibilities when it seeks to acquire land by condemnation. One court dismissed a condemnation action because the United States had not complied with the Council's regulations.[108] Other courts rejected this approach, finding that the duties imposed by NHPA arise only after the Federal Government owns the property involved.[109] Therefore, although most courts find that noncompliance with Section 106 cannot be used to prevent a condemnation action,[110] the Federal Government must nonetheless comply with Section 106 before it can take possession or control of the condemned property.[111] Applying the conclusion reached in earlier condemnation cases—that transfer of title is an environmentally neutral action—one court found that the Government's reclaiming of title to property previously held by others under a special use permit was not an undertaking.[112]

The approval of Federal financial assistance to private, State, or local projects is also an undertaking.[113] Federal financial assistance falls into two basic categories: direct assistance grants for specific projects, such as

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[103]Daingerfield Island Protective Soc'y v. Babbitt, 40 F.3d 442 (D.C. Cir. 1994); Gettysburg Battlefield Preservation Ass'n v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993).

[104]Ferris v. Secretary of the United States Dep't of Transp., No. 89-C-779-C (W.D. Wis. 1990).

[105]Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990).

[106]Pueblo of Sandia v.United States, 50 F.3d 856 (10th Cir. 1995).

[107]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); Illinois Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

[108]United States v. 4.18 Acres of Land, 542 F.2d 786 (9th Cir. 1976).

[109]United States ex. rel. Tenn. Valley Auth. v. Three Tracts of Land, 415 F. Supp. 586 (E.D. Tenn. 1976).

[110]United States v. 45,149.58 Acres of Land, 455 F. Supp. 192 (E.D.N.C. 1978).

[111]United States v. 162.20 Acres of Land, 639 F.2d 299 (5th Cir.), *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).

[112]Paulina Lake Historic Cabin Owners Ass'n v. United States Dep't of Agric. Forest Serv., 577 F. Supp. 1188 (D. Or. 1983) (citing United States v. 162.20 Acres of Land, 639 F.2d 299 (5th Cir. Unit A), *cert. denied*, 454 U.S. 828 (1981)).

[113]16 U.S.C. § 470w(7)(B) (1994).

transportation,[114] housing,[115] rural electrification,[116] and urban development projects,[117] and indirect assistance, such as block grants for programs such as urban renewal,[118] community development,[119] and law enforcement.[120] Federal loan guarantees also have been held to be within the scope of Section 106.[121] Other types of assistance, such as technical assistance, may also be considered an undertaking.[122] The legislative history of NHPA indicates that the term "assistance" was intended to be viewed broadly, not limited to financial assistance.[123] The 1992 amendments to NHPA also refer broadly to Federal "assistance" in Section 101(k), the anticipatory demolition

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[114]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) (bridge replacement); Communities, Inc. v. Busey, 956 F.2d 619 (6th Cir.), *cert. denied*, 506 U.S. 953 (1992) (airport); 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) (highway); Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976) (highway); Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99 (N.D. Ga. 1975), *supp. order*, 414 F. Supp. 121 (1976), *aff'd per curiam sub. nom.* Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth., 576 F.2d 573 (5th Cir. 1978) (mass transportation project).

[115]Boyd v. Roland, 789 F.2d 347 (5th Cir. 1986); Wicker Park Historic Dist. Preservation Fund v. Pierce, 565 F. Supp. 1066 (N.D. Ill. 1982) (rental housing); Aertson v. Landrieu, 488 F. Supp. 314 (D. Mass.), *aff'd*, 637 F.2d 12 (1st Cir. 1980) (low-income housing).

[116]El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991).

[117]North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992); Natural Resources Defense Council v. City of New York, 528 F. Supp. 1245 (S.D.N.Y. 1981), *aff'd*, 672 F.2d 292 (2d Cir.), *cert. dismissed*, 456 U.S. 920 (1982); 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).

[118]Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982); WATCH v. Harris, 603 F.2d 310 (2d Cir.), *cert. denied*, 444 U.S. 995 (1979); Hart v. Denver Urban Renewal Auth., 551 F.2d 1178 (10th Cir. 1977); Wisconsin Heritages, Inc. v. Harris, 460 F. Supp. 1120 (E.D. Wis. 1978), 490 F. Supp. 1334 (1980).

[119]Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21 (6th Cir. 1980); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975).

[120]Ely v. Velde (Ely I), 451 F.2d 1130 (4th Cir. 1971).

[121]Carson v. Alvord, 487 F. Supp. 1049 (N.D. Ga. 1980) (public housing).

[122]H.R. Rep. No. 1457, 96th Cong., 1st Sess., at 45 (1980) (committee notes that there is a spectrum of Federal undertakings, ranging from direct Federal funding to Federal technical assistance for privately funded actions).

[123]*Id.*

provision.[124] However, some courts have narrowly interpreted assistance as strictly referring to financial assistance.[125]

Federal approvals, permits, or licenses for non-Federal activities are also undertakings.[126] Thus, Section 106 encompasses approvals such as those for mining activities,[127] railroad abandonments and exemptions,[128] changes in use of park land,[129] and authorizations for activities or use of public lands under the jurisdiction of the Forest Service or the Bureau of Land Management.[130] Permits falling under the definition of an undertaking include certain dredge and fill permits,[131] navigational permits,[132] and permits for private activities on Federal properties.[133] Licenses issued by Federal agencies are also undertakings.[134]

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[124]16 U.S.C. § 470h-2(k) (1994).

[125]Lee v. Thornburgh, 707 F. Supp. 600 (D.D.C.), *rev'd*, 877 F.2d 1053 (D.C. Cir. 1989).

[126]16 U.S.C. § 470w(7)(C) (1994).

[127]National Indian Youth Council v. Andrus, 501 F. Supp. 649 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981).

[128]Berkshire Scenic Ry. Museum v. Interstate Commerce Comm'n, 52 F.3d 378 (1st Cir. 1995); Friends of Sierra R.R. v. Interstate Commerce Comm'n, 881 F.2d 663 (9th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1990); Connecticut Trust for Historic Preservation v. Interstate Commerce Comm'n, 841 F.2d 479 (2d Cir. 1988).

[129]Daingerfield Island Protective Soc'y v. Babbitt, 40 F.3d 442 (D.C. Cir. 1994); Fill the Pool Comm. v. Village of Johnson City, No. 82-CV-762 (HGM) (N.D.N.Y. Aug. 19, 1982) (demolition of pool in park obtained with Federal grant required compliance with § 106 prior to approval by National Park Service).

[130]Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994).

[131]Vieux Carré Property Owners, Residents & Assocs. v. Brown, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990); Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993); Walsh v. United States Army Corps of Eng'rs, 757 F. Supp. 781 (W.D. Tex. 1990); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985); Hough v. Marsh, 557 F. Supp. 74 (D. Mass. 1982); National Trust for Historic Preservation v. United States Army Corps of Eng'rs, 552 F. Supp. 784 (S.D. Ohio 1982); Bayou St. John Improv. Ass'n 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).

[132]Citizens' Comm. for Envtl. Protection v. United States Coast Guard, 456 F. Supp. 101 (D.N.J. 1978).

[133]Native Americans for Enola v. United States Forest Serv., 832 F. Supp. 297 (D. Or. 1993), *vacated*, 60 F.3d 645 (9th Cir. 1995); 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); Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983) (authorization of expansion of private ski resort on Federal land).

[134]16 U.S.C. § 470w(7)(C) (1994); 36 C.F.R. § 800.2(o) (1995); Weintraub v. Rural Elec. Admin., 457 F. Supp. 78 (M.D. Pa. 1978) (Rural Electrification Administration's requirement that its borrowers receive agency approval of construction plans and the agency's right to control surplus funds did not amount to a license; NHPA did not apply).

Although the term "undertaking" encompasses many activities, the courts have placed limitations on its breadth. In some cases, even if a Federal agency approves of a project or issues a permit, courts have found that an undertaking does not exist. Courts will examine the type of approval given by the Federal agency and, whether the approval was a prerequisite to the project, or was merely a non-binding recommendation, in which case the approval does not rise to the level of an undertaking, according to the courts.[135] Similarly, if permit issuance was merely a ministerial act[136] or authorized truly inconsequential activities,[137] the Federal action is not viewed as an undertaking by some courts. Generally, when the Federal agency has minimal control over or involvement in the project, courts have increasingly found that Section 106 does not apply.[138] Additionally, if portions of a project are federally funded or approved, courts will examine the relationship between those aspects of the project to the project as a whole in order to determine whether an undertaking exists.[139] The courts tend to look at such factors as the independent utility of the federally funded section, the stated purpose of the Federal action, and the magnitude of the Federal portion of the action in relation to the action as a whole.[140] Some courts have declined

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[135]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 Ass'n v. Christopher, 49 F.3d 750 (D.C. Cir. 1995); Village of Los Ranchos v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); People for Responsible Omaha Urban Dev. v. Interstate Commerce Comm'n, 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); Lee v. Thornburgh, 707 F. Supp. 600 (D.D.C.), *rev'd*, 877 F.2d 1053 (D.C. Cir. 1989); Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987); Techworld Dev. Corp. v. District of Columbia Preservation League, 648 F. Supp. 106 (D.D.C. 1986).

[136]Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n, 959 F.2d 508 (4th Cir. 1992).

[137]Vieux Carré Property Owners, Residents & Assocs. v. Brown, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990).

[138]*See supra* notes 134-36; Lee v. Thornburgh, 877 F.2d 1053 (D.C. Cir. 1989); People for Responsible Omaha Urban Dev. v. Interstate Commerce Comm'n, 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); Edwards v. First Bank of Dundee, 534 F.2d 1242 (7th Cir. 1976) (when no Federal funds or Federal authority to license demolition of building involved, that State bank was federally insured and required to obtain the permission of Federal agency to relocate business did not convert private demolition into Federal action). *But see* Capitol Hill Restoration Soc'y v. Heimann, No. 80-0237 (D.D.C. July 31, 1980) (Comptroller of Currency required to comply with NHPA in approving application of national bank to establish branch).

[139]Village of Los Ranchos v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); People for Responsible Omaha Urban Dev. v. Interstate Commerce Comm'n, 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); Historic Preservation Guild v. Burnley, 896 F.2d 985 (6th Cir. 1989); Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985) (Corps of Engineers must consider effect of private development even though only Federal involvement was issuance of permit for placement of riprap in river on development's boundary); River v. Richmond Metro. Auth., 359 F. Supp. 611 (E.D. Va.), *aff'd per curiam*, 481 F.2d 1280 (4th Cir. 1973) (local government received Federal funds for aspects of highway project, but no Federal involvement in the particular segment of the highway system at issue; court held no "Federal undertaking"); *But see* Thompson v. Fugate, 347 F. Supp. 120 (E.D. Va. 1972) (segment of beltway not segregable even though no Federal funds sought for segment).

[140]*Id.*

to apply NHPA when a proposed project entailed only effects of short duration,[141] or the effects on historic properties were slight.[142]

The degree of Federal control over a project and the retention of Federal authority to influence a project is also essential in determining whether a project that once had Federal involvement still constitutes an undertaking.[143] The Council's regulations include continuing projects as undertakings, as long as aspects of the continuing projects have not been previously considered.[144] If all the elements of a project have been considered previously, the project is not considered an undertaking, and Section 106 is deemed to have been satisfied.[145] Courts have declined in two cases to interpret Memoranda of Agreement as providing the basis for a finding of continued Federal involvement.[146] The courts reasoned that completion of the original project terminated Federal involvement. In contrast, courts have determined that ongoing projects may require ongoing NHPA compliance.[147] The general rule is that an agency must fulfill its historic preservation review requirements as long as it is still possible to effect changes in an undertaking to prevent or mitigate an adverse impact on a historic resource.[148] The courts may use this rule to define the point at which the agency "decision" is made.[149]

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[141]Cobble Hill Ass'n v. Adams, 470 F. Supp. 1077 (E.D.N.Y. 1979) (temporary detour near historic district during highway reconstruction).

[142]Petterson v. Froehlke, 354 F. Supp. 45 (D. Or. 1972) (historic site 10 miles from airport expansion project).

[143]Gettysburg Battlefield Preservation Ass'n v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993); North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992); Vieux Carré Property Owners, Residents & Assocs. v. Brown, 948 F.2d 1436 (5th Cir. 1991); Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983).

[144]36 C.F.R. § 800.2(o) (1995).

[145]McMillan Park Comm. v. National Capital Planning Comm'n, 759 F. Supp. 908 (D.D.C. 1991), 968 F.2d 1283 (D.C. Cir. 1992).

[146]Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993); Waterford Citizens' Ass'n v. Reilly, 970 F.2d 1287 (4th Cir. 1992).

[147]Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); Fill the Pool Comm. v. Village of Johnson City, No. 82-CV-762 (HGM) (N.D.N.Y. Aug. 19, 1982); National Indian Youth Council v. Andrus, 501 F. Supp. 649 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981).

[148]Vieux Carré Property Owners, Residents & Assocs. v. Brown, 948 F.2d 1436 (5th Cir. 1991); Gettysburg Battlefield Preservation Ass'n v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993); North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992); Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983). *See also* Nehring v. Harris, No. 79-C-1182 (N.D. Ill. Apr. 12, 1979), *dismissed*, 605 F.2d 559 (7th Cir. 1979); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975).

[149]Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); Wisconsin Heritages, Inc. v. Harris, 460 F. Supp. 1120 (E.D. Wis. 1978) ("decision" was execution of loan and capital grant contract at time when agency could no longer require alterations in plans); Committee to Save the South Green v. Hills, [1977] 7 Envtl. L. Rep.

### 3. Timing: When an agency must comply with Section 106

Another major issue in Section 106 litigation has been determining the precise point in an agency's planning and decisionmaking process when NHPA is triggered. Section 106 requires that the agency must comply "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 . . . ."[150] The Council's regulations require compliance "early in the planning stages of the undertaking, when the widest feasible range of alternatives is open for consideration . . . ."[151] The courts have made several attempts to define the phrase "prior to the approval of the expenditure of funds." In 1969, one court noted that "prior to the approval" did not mean "prior to the expenditure."[152] In that case, the agency had approved funding prior to the enactment of NHPA but had not yet distributed all the funds; the court held Section 106 to be inapplicable. More recently, the D.C. Circuit found it acceptable that an agency conditionally approved an airport expansion plan before Section 106 had been completed, provided that no expenditures of Federal monies for construction were made until completion of the Section 106 process.[153] Similarly, where an order is conditioned upon compliance with Section 106, no violation has been found in light of the Council's regulatory provision allowing nondestructive planning activities and phased compliance.[154] However, if a project is conditionally approved upon completion of the Section 106 process, but funds have already been released and construction initiated, the Federal agency runs the risk of a court finding a violation of NHPA.[155]

Although a Federal agency should comply with NHPA as early in its decisionmaking process as possible, failure to comply early does not relieve an agency of its Section 106 responsibilities, for the courts have held that NHPA applies to all unexecuted parts of a large project.[156] Indeed, courts have held that as long as there is still an ability to influence the project, Section 106 applies.[157] Whenever an agency is to approve funds in stages,

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(Envtl. L. Inst.) 20,061 (D. Conn. Nov. 5, 1976); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975).

[150]16 U.S.C. § 470f (1994).

[151]36 C.F.R. § 800.3(c) (1995).

[152]Kent County Council for Historic Preservation v. Romney, 304 F. Supp. 885 (W.D. Mich. 1969).

[153]City of Grapevine v. Department of Transp., 17 F.3d 1502 (D.C. Cir.), *cert. denied*, 115 S. Ct. 635 (1994).

[154]Yerger v. Robertson, 981 F.2d 460 (9th Cir. 1992); 36 C.F.R. § 800.3(c) (1995).

[155]El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991) (court preliminarily enjoined applicant from continuing construction where Rural Electrification Administration failed to ensure that applicant adhered to conditional approval of project).

[156]Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); Thompson v. Fugate, 347 F. Supp. 120 (E.D. Va. 1972).

[157]Vieux Carré Property Owners, Residents & Assocs. v. Brown, 948 F.2d 1436 (5th Cir. 1991) (court states that it is impossible to pre-judge outcome of consultation process).

courts have decided that NHPA applies until the final approval is made.[158] In one case, the Federal agency initiated the consultation process after issuance of a permit, and the court found the agency in compliance with NHPA where the Federal agency had obtained SHPO concurrence after issuing the permit, implemented extensive mitigation measures, and responded to public concerns.[159] In another case, the court explained that as long as environmental effects were considered prior to a Federal agency's making "irretrievable commitments," the agency complied with the National Historic Preservation Act.[160]

### 4. Section 106 applies to eligible and listed properties

Another threshold requirement in triggering the Section 106 process is the historic property's listing or eligibility for listing in the National Register of Historic Places. As noted above, prior to 1976, Section 106 applied only when an undertaking affected properties actually listed in the National Register.[161] Since the 1976 amendments, courts have required agencies to comply with Section 106 when National Register-eligible properties are involved. The Council's regulations define "eligible" as including both properties formally determined as such by the Secretary of the Interior and all other properties that meet the National Register criteria.[162] An eligible property—one that meets the criteria—may be submitted to the Secretary for a formal determination of eligibility under separate regulations.[163] The Secretary, acting through the National Park Service, determines the eligibility of the property by a formal procedure. Most courts find that a property need not be

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[158]Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); WATCH v. Harris, 603 F.2d 310 (2d Cir.), *cert. denied,* 444 U.S. 995 (1979).

[159]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).

[160]Illinois Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied,* 488 U.S. 1004 (1989) (ICC regulations provided for Section 106 process to begin prior to effective date of railroad exemption but after publication of notice of abandonment).

[161]In several cases where the agency action occurred prior to the 1976 amendments, the courts held NHPA inapplicable because the affected properties were not listed in the National Register at the time of the agency's approval of the expenditure of funds. Hart v. Denver Urban Renewal Auth., 551 F.2d 1178 (10th Cir. 1977); South Hill Neighborhood Ass'n v. Romney, 421 F.2d 454 (6th Cir. 1969), *cert. denied,* 397 U.S. 1025 (1970); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975); Saint Joseph Historical Soc'y v. Land Clearance for Redev. Auth., 366 F. Supp. 605 (W.D. Mo. 1973). *But see* Committee to Save the South Green v. Hills, [1977] 7 Envtl. L. Rep. (Envtl. L. Inst.) 20,061 (D. Conn. Nov. 5, 1976) (agency must comply with Council's regulations because property was eligible even though agency need not comply with § 106 because property was not listed in National Register).

[162] 36 C.F.R. § 800.2 (e) (1995).

[163] 36 C.F.R. §§ 63.2, 63.3 (1995).

formally determined eligible to be considered an "eligible property" for purposes of the application of Section 106.[164]

## B. Court Decisions Interpreting the Section 106 Process

The courts have generally followed the Council's regulations, finding them to be in accord with both the letter and the spirit of NHPA. Courts generally defer to the judgment of the Council in interpreting the regulations and in deciding whether an agency has complied with Section 106.[165] One 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 declined to change the Council's interpretation of its statutory authority.[166] Furthermore, the manner in which the Council allows agencies to afford it the opportunity to comment is left entirely to the Council's discretion.[167] In interpreting the Council's regulations, the courts have dealt with several aspects of the Section 106 process—the collection of information regarding historic properties during identification and evaluation, the assessment of effects, the actual commenting process, and the effect of the Council's comments.

### 1. Identification and evaluation

Once a Federal agency has determined that an undertaking exists, the Federal agency must begin the Section 106 process by identifying any National Register-listed or -eligible properties in the area of potential effects.[168] Defining the area of potential effects is a controversial aspect of the Section 106 process, although few courts have specifically addressed this issue. The Council's regulations define that area as "the geographic area or areas within which an undertaking may cause changes in the character or use of historic properites, if any such

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[164]Boyd v. Roland, 789 F.2d 347 (5th Cir. 1986); Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); Hough v. Marsh, 557 F. Supp. 74 (D. Mass. 1982). *See also* Pueblo of Sandia v. United States 50 F.3d 856 (10th Cir. 1995); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985) (agency may not apply different standards of historic review to properties listed in or officially determined eligible for the National Register and properties that might be eligible but have not been listed or officially determined to be eligible). A minority view is that neither Section 106 nor the Council's regulations apply if no properties have been determined formally by the Secretary to be eligible for the Register. Birmingham Realty Co. v. General Servs. Admin., 497 F. Supp. 1377 (N.D. Ala. 1980); Committee to Save the Fox Bldg. v. Birmingham Branch of the Fed. Reserve Bank, 497 F. Supp. 504 (N.D. Ala. 1980).

[165]McMillan Park Comm. v. National Capital Planning Comm'n, 968 F.2d 1283 (D.C. Cir. 1992); Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); 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); National Indian Youth Council v. Andrus, 501 F. Supp. 649 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981).

[166]Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983).

[167]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).

[168]36 C.F.R. § 800.4 (1995).

properties exist."[169] In some cases, the area of potential effects is viewed broadly to go beyond the project limits or permit area,[170] while in other cases courts have not required Federal agencies to consider the effects of their actions beyond the permit area or project limits.[171] The area of potential effects may include public or private property.[172]

The exact nature of a Federal agency's identification effort will depend on the circumstances of each case,[173] but in every case the agency must make a "reasonable and good faith effort" to identify historic properties.[174] Some courts interpret the procedural steps of identification and evaluation strictly,[175] while others deem the agency as having fulfilled its NHPA responsibilities if it has substantially complied with the requirements of NHPA without following the exact procedures.[176]

To identify historic properties, the agency may need to conduct field surveys and predictive modeling of the affected area.[177] The courts have found that a survey need not canvass 100 percent of the impact area and that its scope may vary from case to case. When other evidence suggests that a complete survey would be fruitless, a survey that encompasses less than 100 percent of the affected area may be sufficient.[178] Surveys conducted

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[169]36 C.F.R. § 800.2(c) (1995).

[170]Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985); New Hanover Township v. United States Army Corps of Eng'rs, 796 F. Supp. 180 (E.D. Pa. 1992), *vacated*, 992 F.2d 470 (3d Cir. 1993) (court noted that project's effect on adjacent historic properties would be considered).

[171]People for Responsible Omaha Urban Dev. v. Interstate Commerce Comm'n, CV88-D-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); Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987); Hough v. Marsh, 557 F. Supp. 74 (D. Mass. 1982); Puerto Rico v. Muskie, 507 F. Supp. 1035 (D.P.R. 1981).

[172]*See* Pacific Gas Transmission Co. v. Richardson's Recreational Ranch, 773 F. Supp. 246 (D. Or. 1991), *aff'd*, 9 F.3d 1394 (9th Cir. 1993).

[173]The Council's proposed new regulations would clarify that identification efforts depend upon the nature of the project, the degree of its impact, and the likely nature and location of historic properties.

[174]36 C.F.R. § 800.4(b) (1995); Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995).

[175]Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995); Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990); Ferris v. Secretary of the United States Dep't of Transp., No. 89-C-779-C (W.D. Wis. 1990); National Trust for Historic Preservation v. United States Army Corps of Eng'rs, 552 F. Supp. 784 (S.D. Ohio 1982).

[176]Commonwealth of Kentucky v. United States Army Corps of Eng'rs, No. 899-77 (E.D. Ky. Sept. 21, 1992); 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).

[177]36 C.F.R. § 800.4(a)(2) (1995).

[178]Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983) (35 percent survey was sufficient); Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981), *rev'd on other grounds sub nom.* Weinberger v. Barcelo, 456 U.S. 305 (1982) (sample showed areas with no historic sites).

without consultation with the SHPO are not enough, however, to satisfy the identification requirement.[179] Consultation with the SHPO is considered an essential component of the identification effort.[180] Absent consultation with the SHPO, courts have found that the agency had no reasonable basis to determine what further actions, aside from a survey, may be necessary.[181] Additionally, early contact with the SHPO is essential, so that alternatives to the proposed undertaking are still available.[182]

Another essential component of the identification effort is the requirement that agencies seek information from Indian tribes, local governments, organizations, and the public.[183] A recent decision indicates that courts will carefully examine identification efforts when Native American concerns are implicated.[184] In that case, form letters to tribes requesting detailed information on the location and use of sites by Native Americans and meetings with tribal leaders to seek specific information on traditional cultural properties was not enough to constitute a reasonable and good faith effort to identify historic properties. Given the sensitive nature of eliciting information from Native Americans on such properties, the information provided to the Federal agency indicated a need to further investigate the existence of sacred sites.[185]

After identifying properties involved, the agency must evaluate those properties to determine whether they are eligible for listing on the National Register. A Federal agency applies the National Register criteria to all

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[179]Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990). *But see* Native Americans for Enola v. United States Forest Serv., 832 F. Supp. 297 (D. Or. 1993), *vacated*, 60 F.3d 645 (9th Cir. 1995); 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).

[180]Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990); Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981), *rev'd on other grounds sub nom.* Weinberger v. Barcelo, 456 U.S. 305 (1982). *See also* Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985). One court has held that when a SHPO recommends that a survey be done, the agency must show good cause for failing to follow that recommendation. Bayou St. John Improv. Ass'n v. Sands, No. 81-1358 (E.D. La. May 28, 1981), *injunction modified*, [1983] 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,011 (June 17, 1982). Although consultation with the SHPO is required, the SHPO's approval is not. City of Columbia v. Soloman, No. 78-2109 (D.S.C. June 12, 1979).

[181]Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990).

[182]El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991); Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784 (9th Cir. 1983). *But see* 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).

[183]36 C.F.R. § 800.4(a)(iii) (1995). See Pueblo of Sandia v.United States, 50 F.3d 856 (10th Cir. 1995); Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993); Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990).

[184]Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995).

[185]*Compare* Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995) (court notes that reasonable effort to identify traditional cultural properties depends on likelihood that properties may exist) *with* Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994) (court found that Forest Service appropriately and consistently solicited Native American input) and Native Americans for Enola v. United States Forest Serv., 832 F. Supp. 297 (D. Or. 1993), *vacated*, 60 F.3d 645 (9th Cir. 1995) (district court rejected Native American claims that further investigation was required).

properties that may possess historic value and, if the agency and the SHPO agree that a property meets the criteria, the property is considered eligible.[186] If they agree that the property does not meet the criteria, then the property will not be considered eligible.[187] If they disagree, or if the Council or Secretary so requests, the Federal agency must request a determination of eligibility from the Secretary of the Interior.[188] If the question of a property's eligibility is submitted to the Secretary of the Interior and the Secretary determines the property to be eligible, the agency must continue with the Section 106 process.[189] If, however, the Secretary makes a determination of eligibility on its own motion and after an agency has passed the decision point in its undertaking, an agency is not required to go back and comply with Section 106.[190]

If no historic properties are found, a Federal agency is required to make that determination known to the SHPO by forwarding the necessary documentation and notifiying interested persons of its finding.[191] The adequacy of the documentation is an essential aspect of the evaluation step. Courts have observed that consultation is meaningless unless the SHPO has access to all relevant information when it makes its identification and evaluation decisions and have interpreted the consultation requirement to mean "informed consultation."[192] Additionally, the Federal agency must make its documentation available to the public. If no historic properties are found, then the agency is not required to take any further steps.[193] If historic properties are found, the effect of the agency's undertaking must be assessed.[194]

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[186]36 C.F.R. § 800.4(c)(2) (1995).

[187]36 C.F.R. § 800.4(c)(3) (1995). However, members of the public can appeal to the Keeper of the National Register. 36 C.F.R. § 60.12 (1995).

[188]36 C.F.R. § 800.4(c)(4) (1995).

[189]36 C.F.R. § 800.4 (1995). *But see* Native Americans for Enola v. United States Forest Serv., 832 F. Supp. 297 (D. Or. 1993), *vacated*, 60 F.3d 645 (9th Cir. 1995) (court found Forest Service in compliance with NHPA even though it issued permit without the Secretary of the Interior issuing a determination of eligibility).

[190]Central Okla. Preservation Alliance, Inc. v. Oklahoma City Urban Renewal Auth., 471 F. Supp. 68 (W.D. Okla. 1979).

[191]36 C.F.R. § 800.4(d) (1995).

[192]Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995) (court held that failure to provide affidavits to SHPO and misrepresentation of Tribe's position evidenced lack of good faith effort to identify and evaluate properties).

[193]36 C.F.R. § 800.4(d) (1995).

[194]36 C.F.R. § 800.4(e) (1995).

### 2. Assessing effects

For each property listed in or eligible for listing in the National Register, the agency must apply the Council's criteria of effect[195] to determine whether the undertaking will have an "effect" on historic resources.[196] If the agency determines there is no effect, the agency must document its finding, and notify the SHPO and interested persons. One court has found a Federal agency in violation of Section 106 where it failed to notify the SHPO of its "no effect" determination.[197]

If the undertaking will have an effect on the historic property, the agency applies the Council's criteria of adverse effect in consultation with the SHPO.[198] The criteria of adverse effect apply only to those characteristics of a property that qualify it for inclusion in the National Register.[199] When the agency decides that the effect will not be adverse, it must obtain SHPO concurrence and forward a determination of no adverse effect to the Council or, alternatively, submit its finding to the Council and notify the SHPO of its finding.[200] Adequate documentation must accompany the notifications to the SHPO and Council.[201] However, at least one court found a Federal agency's documentation satisfactory when it mentioned one historic site but failed to mention others nearby since the Council was aware of the location of the project and its proximity to other historic sites.[202] If the Council does not object to the determination of no adverse effect, the agency is deemed to have satisfied its Section 106 duties, and the undertaking may proceed.[203] Agencies have also made conditional no adverse effect determinations in

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[195]36 C.F.R. § 800.5(a) (1995).

[196]The "effect" step would be eliminated under the Council's proposed regulations. Instead, the agency would proceed directly to evaluating whether the undertaking would have an "adverse effect."

[197]Ferris v. Secretary of the United States Dep't of Transp., No. 89-C-779-C (W.D. Wis. 1990).

[198]36 C.F.R. §§ 800.5(c), 800.9(b) (1995).

[199]36 C.F.R. § 800.9(a) (1995). Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied,* 464 U.S. 956 (1983); City of Columbia v. Soloman, No. 78-2109 (D.S.C. June 12, 1979).

[200]36 C.F.R. § 800.5(d)(1) (1995).

[201]36 C.F.R. § 800.5(d) (1995); Ferris v. Secretary of the United States Dep't of Transp., No. 89-C-779-C (W.D. Wis. 1990).

[202]Daingerfield Island Protective Soc'y v. Babbitt, 40 F.3d 442 (D.C. Cir. 1994) (court notes that Council could have requested additional information or *sua sponte* considered the effects on the nearby properties).

[203]36 C.F.R. § 800.5(d)(2) (1995); Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992), *aff'd,* 990 F.2d 729 (2d Cir. 1993); Communities Inc. v. Busey, 956 F.2d 619 (6th Cir.), *cert denied,* 506 U.S. 953 (1992); Wicker Park Historic Dist. Preservation Fund v. Pierce, 565 F. Supp. 1066 (N.D. Ill. 1982); Aertson v. Landrieu, 488 F. Supp. 314 (D. Mass.), *aff'd,* 637 F.2d 12 (1st Cir. 1980); Hoe v. Alexander, 483 F. Supp. 746 (D. Haw. 1980).

consultation with SHPOs. Although such agreements are not specifically provided for in the regulations,[204] at least one court has recognized the validity of such a determination.[205]

If the agency determines that there will be an adverse effect or if the Council objects to a determination of no adverse effect, the parties enter into the consultation process, the primary means by which the Council exercises its opportunity to comment.[206]

### 3. The Council's opportunity to comment

At the heart of Section 106 review is the commenting process. In most cases, this takes the form of consultation among the agency, the State Historic Preservation Officer, and the Council staff, although at times other interested parties may be invited to participate. During consultation, these parties attempt to reach agreement on measures to avoid or mitigate the adverse effects of the agency's undertaking on historic resources.[207] If the parties agree, they generally execute a Memorandum of Agreement[208] or, if an entire program is involved, a Programmatic Agreement (PA).[209] Execution of an agreement for every project is not required by the Council's regulations, although it is encouraged and has evolved as the most practical means of obtaining resolution of the consultation process.[210]

When Memoranda of Agreement have been executed according to the procedures in the Council's regulations, courts have upheld them.[211] Under the Council's regulations and court decisions, a ratified MOA or PA constitutes the comments of the Council, evidencing the agency has satisfied its Section 106 responsibilities.[212] The 1992 amendments to the National Historic Preservation Act acknowledged the importance of the MOA in the Council's regulations, stating that, where an MOA has been signed, it must govern the

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[204]*See* 36 C.F.R. § 800.5(d)(2) (1995) (this provision is used as a justification for such agreements).

[205]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).

[206]36 C.F.R. § 800.5(e) (1995). *See* City of Grapevine v. Department of Transp., 17 F.3d 1502 (D.C. Cir.), *cert. denied*, 115 S. Ct. 635 (1994); Vieux Carré Property Owners, Residents, & Assocs. v. Pierce, No. 81-4777 (E.D. La. Aug. 10, 1982) (Council rejected determination of no adverse effect and parties entered into consultation process).

[207]36 C.F.R. § 800.5(e) (1995).

[208]36 C.F.R. § 800.5(e)(4) (1995).

[209]36 C.F.R. § 800.13 (1995).

[210]West Branch Valley Flood Protection Ass'n v. Stone, 820 F. Supp. 1 (D.D.C. 1993).

[211]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); Don't Tear it Down, Inc. v. Pennsylvania Avenue Dev. Corp., 642 F.2d 527 (D.C. Cir. 1980).

[212]36 C.F.R. § 800.6(c) (1995); Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993); Waterford Citizens' Ass'n v. Reilly, 970 F.2d 1287 (4th Cir. 1992).

undertaking and all its parts.[213] If a Federal agency consults with the Council and SHPO and agrees to certain mitigation measures by incorporating them into permit conditions, but does not execute an MOA, courts have found substantial compliance with the Council's regulations and the intent of NHPA fulfilled.[214] Although an agreement should be reached prior to the final agency decision, courts may find compliance with NHPA if a permit is issued prior to execution of an MOA where the Federal agency complied with the procedural steps of the Council's regulations, incorporated mitigation measures into a permit as conditions, and/or continued to negotiate with the Council after permit issuance.[215] If several agencies are involved in a project, the court may allow one agency to initiate and another to complete consultation, if the Council so approves.[216]

Memoranda of Agreement are similar to contracts, and courts defer to the interpretation of the signatories in questions regarding the meaning of agreement's language.[217] One court has held that persons who were not party to an MOA do not have the privity of contract necessary to maintain an action based on alleged breach of duties imposed by the MOA.[218] Other courts have permitted challenges to an MOA or enforcement actions when the privity issue was not raised.[219] Once an MOA is executed, courts have relied on its language to interpret the scope of the Federal agency's Section 106 obligations.[220]

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[213]16 U.S.C. § 470h-2(*l*) (1994).

[214]Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993). *See also* Walsh v. United States Army Corps of Eng'rs, 757 F. Supp. 781 (W.D. Tex. 1990) (permit conditions provided specific mitigation measures, thus fulfilling requirements of Section 106).

[215]Walsh v. United States Army Corps of Eng'rs, 757 F. Supp. 781 (W.D. Tex. 1990). *See also* City of Grapevine v. Department of Transp., 17 F.3d 1502 (D.C. Cir.), *cert. denied*, 115 S. Ct. 635 (1995); Commonwealth of Kentucky v. United States Army Corps of Eng'rs, No. 89-77 (E.D. Ky. Sept. 21, 1992) (court found Corps in substantial compliance with NHPA even though MOA not signed).

[216]Commonwealth of Kentucky v. United States Army Corps of Eng'rs, No. 89-77 (E.D. Ky. Sept. 21, 1992). *But see* McMillan Park Comm. v. National Capital Planning Comm'n, 759 F. Supp. 908 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C.Cir. 1992).

[217]Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp., 642 F.2d 527 (D.C. Cir. 1980).

[218]Citizens' Comm. for Envtl. Protec. v. United States Coast Guard, 456 F. Supp. 101 (D.N.J. 1978).

[219]Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993); West Branch Valley Flood Protection Ass'n v. Stone, 820 F. Supp. 1 (D.D.C. 1993); Waterford Citizens' Ass'n v. Reilly, 970 F.2d 1287 (4th Cir. 1992); Washington Trust for Historic Preservation v. City of Seattle, No. C87-1506C (W.D. Wash. Feb. 25, 1988); Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp., 642 F.2d 527 (D.C. Cir. 1980).

[220]West Branch Valley Flood Protection Ass'n v. Stone, 820 F. Supp. 1 (D.D.C. 1993); Waterford Citizens' Ass'n v. Reilly, 970 F.2d 1287 (4th Cir. 1992); Washington Trust for Historic Preservation v. City of Seattle, No. C87-1506C (W.D. Wash. Feb. 25, 1988); *See also* Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993).

Occasionally, parties to the consulting process fail to agree on the terms of an MOA, and the Section 106 process is terminated. When this occurs, the agency must request the comments of the Council.[221] In recognizing the importance of resolution through agreements, the 1992 amendments provide that the head of the agency must document the decision where an agreement has not been made; the decision may not be delegated.[222] Terminations of consultation are extremely rare,[223] but when they occur, Council members consider the matter and issue comments.[224] Comments from the Council membership do not represent agreement between the agency and the Council. The head of the agency must consider the Council's comments in reaching a final decision on the undertaking and report that decision to the Council.[225]

Until the Council issues its comments, the agency is precluded from taking or sanctioning any action that could either result in an adverse effect on the historic property or foreclose the consideration of modifications to the undertaking that would avoid or mitigate adverse effects.[226] However, courts will find that the Council still has an opportunity to comment as long as irretrievable commitments have not been made.[227]

If the agency proceeds with its undertaking before completing the Section 106 process, it may be in violation of NHPA. When agencies have failed to comply with Section 106 before final approval was given, courts have enjoined those undertakings and required agencies to comply with Section 106. Ultimately, however, this remedy may delay, but does not halt, completion of undertakings.[228] When an agency makes a final decision on an

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[221]36 C.F.R. § 800.6(b) (1995). *See* Vieux Carré Property Owners, Residents, & Assocs. v. Pierce, No. 81-4777 (E.D. La. Aug. 10, 1982) (after unsuccessful consultation, panel meeting was held; court upheld the agency's compliance with NHPA).

[222]16 U.S.C. § 470h-2(*l*) (1994).

[223]Terminations occur approximately 5-10 times per year.

[224]There have been two suits alleging that the Council's commenting process was influenced improperly by political pressure. Natural Resources Defense Council v. City of New York, 534 F. Supp. 279 (S.D.N.Y.), *aff'd*, 672 F.2d 292 (2d Cir.), *cert. dismissed*, 456 U.S. 920 (1982); 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). In each case, the court examined the administrative record to ascertain what factors were involved in the decisionmaking process. Where the evidence showed that decisions were made on the basis of factors properly in the record and not on the political communications, the commenting process was upheld.

[225]16 U.S.C. § 470h-2(*l*) (1994); 36 C.F.R. § 800.6(c)(2) (1995).

[226]36 C.F.R. § 800.5(d) (1995); National Trust for Historic Preservation v. United States Army Corps of Eng'rs, 552 F. Supp. 784 (S.D. Ohio 1982) (Corps permit invalidated because it had been issued before the Section 106 process was complete).

[227]City of Grapevine v. Department of Transp., 17 F.3d 1502 (D.C. Cir.), *cert. denied*, 115 S. Ct. 635 (1994); Commonwealth of Kentucky v. United States Army Corps of Eng'rs, No. 89-77 (E.D. Ky. Sept. 21, 1992); Vieux Carré Property Owners, Residents, & Assocs. v. Pierce, 948 F.2d 1436 (5th Cir. 1991).

[228]*See* El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991); Fill the Pool Comm. v. Village of Johnson City, No. 82-CV-762 (HGM) (N.D.N.Y. Aug. 19, 1982); Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978); Thompson v. Fugate, 347 F. Supp. 120 (E.D. Va. 1972).

undertaking without complying with Section 106, however, it has foreclosed the Council's opportunity to comment. A court may, therefore, enjoin the agency from implementing its undertaking.[229] As long as the Federal agency solicits the Council's comments in advance of making its final decision, courts have determined that the Council's opportunity to comment has not been foreclosed.[230] In some cases, after examining the circumstances of the consultation and the Federal agencies' efforts in obtaining Council comment, courts will find that an agency was in "substantial compliance" with Section 106 even if the agency did not adhere to every step in the Section 106 process.[231]

### 4. Effect of the Council's comments

Although Section 106 and the Council's regulations impose important procedural duties on Federal agencies, the Council is purely an advisory body; it has no authority to impose substantive requirements on an agency.[232] When an agency enters into an MOA, an enforceable legal document, it agrees to implement the agreement's terms.[233] Similarly, where an agency agrees to impose certain conditions on permits and licenses, such conditions must be upheld.[234] If the agency obtains the Council's comments upon termination or foreclosure of the

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[229]36 C.F.R. § 800.6(d) (1995). *See* National Trust for Historic Preservation v. United States Army Corps of Eng'rs, 552 F. Supp. 784 (S.D. Ohio 1982) (all work was permanently enjoined under permit issued before § 106 process completed); Ferris v. Secretary of the United States Dep't of Transp., No. 89-C-779-C (W.D. Wis. 1990) (court found Council's opportunity to comment foreclosed where Coast Guard approved changes to lighthouse prior to notifying Council).

[230]Connecticut Trust for Historic Preservation v. Interstate Commerce Comm'n, 841 F.2d 479 (2d Cir. 1988) (Council had concluded that its opportunity to comment on abandonment of historic railroad line as a whole was foreclosed but opportunity to comment on individual affected features was not).

[231]Commonwealth of Kentucky v. United States Army Corps of Eng'rs, No. 89-77 (E.D. Ky. Sept. 21, 1992) (court found agency in compliance with NHPA even though parties failed to agree to MOA); 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) (agency in "substantial compliance" with NHPA even though consultation and mitigation measures instituted after issuance of permit); Pennsylvania v. Morton, 381 F. Supp. 293 (D.D.C. 1974) (agency was in "substantial compliance" with NHPA even though it did not seek the Council's comments until after entering into a land exchange agreement because the agency made an effort to carry out the Council's recommendations made after the fact). *But see* Don't Tear It Down, Inc. v. General Servs. Admin., 401 F. Supp. 1194 (D.D.C. 1975) (court found agency actions in violation of NHPA where agency proceeded with demolition prior to completing consultation and receiving Council comment).

[232]*See, e.g.*, Paulina Lake Historic Cabin Owners Ass'n v. United States Dep't of Agric. Forest Serv., 577 F. Supp. 1188 (D. Or. 1983) (decision to raze cabins up to agency). *See also* Walsh v. United States Army Corps of Eng'rs, 757 F. Supp. 781 (W.D. Tex. 1990) (NHPA imposes procedural requirements); Connecticut Trust for Historic Preservation v. Interstate Commerce Comm'n, 841 F.2d 479 (2d Cir. 1988).

[233]16 U.S.C. § 470h-2(*l*) (1994). *See* Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993); Waterford Citizens' Ass'n v. Reilly, 970 F.2d 1287 (4th Cir. 1992); Washington Trust for Historic Preservation v. City of Seattle, No. C87-1506C (W.D. Wash. Feb. 25, 1988).

[234]El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991). *See also* Pacific Gas Transmission Co. v. Richardson's Recreational Ranch, 773 F. Supp. 246 (D. Or. 1991), *aff'd*, 9 F.3d 1394 (9th Cir. 1993).

consultation process, it has the discretion not to follow them.[235] However, an agency's actions are reviewable under the Administrative Procedure Act,[236] a statute which prohibits agencies from acting arbitrarily or capriciously in their decisionmaking.

## V. Court Opinions on Compliance with Section 110

While Section 110 is designed to promote internal agency programs, it also contains directives for the management of federally owned historic properties. Under Section 110, each Federal agency must establish a program to locate, inventory, and nominate to the Secretary of the Interior all properties under its control that appear to qualify for the National Register; must also use available historic properties to the maximum extent feasible (rather than acquiring, constructing, or leasing other buildings); and must manage and maintain historic properties under its control with due consideration for preservation of their historic values.[237]

Section 110 also creates duties that are not limited to federally owned historic properties. When impairment or demolition of a historic property is necessary, the responsible agency must record the property in accordance with professional standards.[238] When National Historic Landmarks are involved, the agency has a substantive obligation to undertake such planning and actions as may be necessary to minimize direct and adverse effects on the landmark and must afford the Council a reasonable opportunity to comment on the undertaking.[239]

The 1992 amendments added several new aspects to Section 110. Section 110(*l*) specifies the responsibilities of Federal agencies that receive formal comment from the Council, stating that the final agency decision taking into account the effects of an undertaking on historic properties must be made by the head of the Federal agency and documented for the Council's review.[240] This section also clarifies the effect of an executed MOA, specifying that its terms are binding on the conduct of the undertaking in its entirety.[241]

While litigation under this section has been sparse, several courts have interpreted Section 110. In an early case, a panel of Council members considered a city's proposal to construct a hotel and retail facility near a National Historic Landmark and issued comments on the project.[242] The main issue in the case was whether a provision of the Housing and Community Development Act—the Federal statute under which the city had

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[235]Pennsylvania v. Morton, 381 F. Supp. 293 (D.D.C. 1974).

[236]5 U.S.C. § 706 (1994).

[237]16 U.S.C. §§ 470h-2(a) (1994).

[238]16 U.S.C. § 470h-2(b) (1994).

[239]16 U.S.C. § 470h-2(f) (1994).

[240]16 U.S.C. § 470h-2(l) (1994).

[241]*Id. See also* 36 C.F.R. § 800.6(c)(1) (1995).

[242]Vieux Carré Property Owners, Residents, & Assocs. v. Pierce, No. 81-4777 (E.D. La. Aug. 10, 1982).

obtained project funds and, acting as "Federal agency," assumed responsibility for environmental review—applied to duties under Section 110(f) just as it did to those under Section 106. The court held that that was the case; by obtaining the Council's comments, the city had complied with Section 110(f). A later case, however, observed that compliance with Section 106 does not necessarily satisfy the mandate of Section 110(f), because 110(f) establishes a higher standard of care to be exercised by Federal agencies when a project may affect a National Historic Landmark.[243]

Several later court decisions also address the relationship between Sections 110 and 106. In one case, the Coast Guard argued that it had adhered to the requirements of Section 110(a) when it modified a lighthouse in order to convert it to solar power. The court recognized that the Coast Guard was complying with Section 110 in attempting to use the lighthouse to the maximum extent feasible; however, the court found that the agency was also required to adhere to the Section 106 procedures when it modified the lighthouse.[244] In another case interpreting the relationship between Sections 110 and 106, the court adopted a narrow view, finding that Section 110 clarified and codified agencies' responsibilities but did not intentionally expand them.[245] Similarly, a 1996 decision described Section 110(a) as an "elucidation" of Section 106 and declined to find that 110(a) created an independent substantive obligation different from Section 106.[246]

Another decision addressed the scope of Section 110(a)'s requirement that Federal agencies inventory historic sites under their ownership or control. The court declined to apply Section 110 to Indian lands held in trust by the Federal Government, reasoning that the tribes held real ownership in the land and the archeological resources it contained.[247] Finally, in interpreting the application of Section 110, one court found that Federal agencies are not required to rehabilitate surplus property; agencies must undertake preservation activities only when it is determined that the property will be of use to the agency's mission.[248]

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[243]Coalition Against a Raised Expressway, Inc. v. Dole, [1987] 17 Envtl. L. Rep. (Envtl. L. Inst.) 20, 466 (S.D. Ala. Oct. 20, 1986), *aff'd*, 835 F.2d 803 (11th Cir. 1988).

[244]Ferris v. Secretary of the United States Dep't of Transp., No. 89-C-779-C (W.D. Wis. 1990).

[245]Lee v. Thornburgh, 877 F.2d 1053 (D.C. Cir. 1989) (court interpreted Sections 110(b) & (d)'s reference to "assistance" as an expenditure of funds, and Section 110(b)'s reference to "agency action" as a license or other approval). [Ed. note: The 1992 amendments use the term "assistance" more broadly in Section 110(k).]

[246]National Trust for Historic Preservation v. Blanck, Civ. Action No. 94-1091 (PLF) (D.D.C. Sept. 13, 1996).

[247]Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990).

[248]Commonwealth of Kentucky v. United States Army Corps of Eng'rs, No. 89-77 (E.D. Ky. Sept. 21, 1992).

# VI. Executive Orders

## A. Executive Order No. 11593

In 1971, five years after Congress enacted NHPA, President Nixon signed Executive Order No. 11593.[249] The Executive Order required Federal agencies to administer cultural properties under their control and direct their policies, plans, and programs in such a way that federally owned sites, structures, and objects of historical, architectural, or archeological significance were preserved, restored, and maintained.[250] To achieve this goal, Federal agencies were required to locate, inventory, and nominate to the National Register of Historic Places all properties under their jurisdiction or control that appear to qualify for listing in the National Register.[251] The courts have held that Executive Order No. 11593 obligates agencies to conduct adequate surveys to locate "any" and "all" sites of historic value,[252] although this requirement applies only to federally owned or federally controlled properties.[253] Moreover, the Executive Order directed agencies to reconsider any plans to transfer, sell, demolish, or substantially alter any property determined to be eligible for the National Register and to afford the Council an opportunity to comment on any such proposal.[254] Again, the requirement applied only to properties within Federal control or ownership.[255] Finally, the Executive Order required agencies to record any listed property that may be substantially altered or demolished as a result of Federal action or assistance and to take necessary measures to provide for maintenance of and future planning for historic properties.[256]

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[249]Exec. Order No. 11,593, 3 C.F.R. 154 (1971), *reprinted in* 16 U.S.C. § 470 note (1994).

[250]*Id.* at § 7.

[251]*Id.* at § 2(a).

[252]Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981), *rev'd on other grounds sub nom.* Weinberger v. Barcelo, 456 U.S. 305 (1982).

[253]Central Okla. Preservation Alliance, Inc. v. Oklahoma City Urban Renewal Auth., 471 F. Supp. 68 (W.D. Okla. 1979); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975).

[254]Exec. Order No. 11,593 § 2(b), 3 C.F.R. 154 (1971), *reprinted in* 16 U.S.C. § 470 note (1994); Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974).

[255]Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir.), *cert. denied,* 429 U.S. 999 (1976).

[256]Exec. Order No. 11,593, § 2(c)-(f), 3 C.F.R. 154 (1971), *reprinted in* 16 U.S.C. § 470 note (1994). *See* 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 Ass'n v. Christopher, 49 F.3d 750 (D.C. Cir. 1995); Wicker Park Historic Dist. Preservation Fund v. Pierce, 565 F. Supp. 1066 (N.D. Ill. 1982).

Two courts have found that citizens have a right of action under Executive Order No. 11593,[257] but other courts disagree, finding that the Executive Order is only a "managerial tool" for the Executive Branch.[258] Other courts have not addressed this issue but simply allowed the action.[259] Opinions differ as to whether compliance with other preservation laws satisfies the requirements of Executive Order No. 11593.[260] Just as for Section 106, noncompliance with Executive Order No. 11593 is not a defense to a condemnation action.[261]

## B. Executive Order No. 13006

In 1996, President Clinton issued Executive Order No. 13006, "Locating Federal Facilities on Historic Properties in our Nation's Central Cities." This Executive Order reaffirms the Federal Government's commitment to historic preservation leadership as articulated in NHPA, calling upon Federal agencies to give, whenever economically prudent and operationally appropriate, first consideration to historic properties in historic districts when locating Federal facilities.[262] If no such property is suitable, agencies must next consider other sites in historic districts, and then historic properties outside of historic districts.[263] Any construction or rehabilitation undertaken by Federal agencies must be architecturally compatible with the surrounding historic properties.[264] The Executive Order also directs Federal agencies to reform regulations and procedures that impede location of Federal facilities in historic properties or districts and to seek the Council's assistance in this effort.[265] Finally,

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[257]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 on other grounds sub nom.* Weinberger v. Barcelo, 456 U.S. 305 (1982); 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).

[258]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 Ass'n v. Christopher, 49 F.3d 750 (D.C. Cir. 1995) (court declined to find implied right of action under Executive Order, but acknowledged that other courts had found such a right); National Indian Youth Council v. Andrus, 501 F. Supp. 649 (D.N.M. 1980), *aff'd,* 664 F.2d 220 (10th Cir. 1981).

[259]*See, e.g.,* Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974).

[260]*See* James v. Lynn, 374 F. Supp. 900 (D. Colo. 1974) (Exec. Order No. 11,593 not enforced; evidence of historic resources presented at trial was sufficient compliance with historic review requirements); Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974) (adequate discussion in environmental impact statement of archeological reources is not compliance with Exec. Order No. 11,593).

[261]United States ex. rel. Tenn. Valley Auth. v. Three Tracts of Land, 415 F. Supp. 586 (E.D. Tenn. 1976).

[262]Executive Order No. 13,006, § 2, 61 Fed. Reg. 26,071 (1996).

[265]*Id.* at § 3

Executive Order No. 13006 calls upon Federal agencies to seek partnerships with States, local governments, Indian tribes and private organizations with the goal of enhancing the Nation's preservation program.[266]

### C. Executive Order No. 13007

In 1996, President Clinton also issued Executive Order No. 13007, intended to protect Native American religious practices. This Executive Order directs Federal land-managing agencies to accommodate Native Americans' use of sacred sites for religious purposes and to avoid adversely affecting the physical integrity of sacred sites.[267] Some sacred sites may be considered traditional cultural properties and, if older than 50 years, may be eligible for the National Register of Historic Places. Thus, compliance with the Executive Order may overlap with Section 106 and Section 110 of NHPA. Under the Executive Order, Federal agencies managing lands must implement procedures to carry out the directive's intent. Procedures must provide for reasonable notice where an agency's action may restrict ceremonial use of a sacred site or adversely affect its physical integrity.[268] Federal agencies with land-managing responsibilities must provide the President with a report on implementation of Executive Order No. 13007 one year from its issuance.

Executive Order No. 13007 builds upon a 1994 Presidential Memorandum concerning government-to-government relations with Native American tribal governments. The Memorandum outlined principles Federal agencies must follow in interacting with federally recognized Native American tribes in deference to Native Americans' rights to self-governance.[269] Specifically, Federal agencies are directed to consult with tribal governments prior to taking actions that affect federally recognized tribes and to ensure that Native American concerns receive consideration during the development of Federal projects and programs. The 1994 Memorandum amplified provisions in the 1992 amendments to NHPA enhancing the rights of Native Americans with regard to historic properties.

## VII. Attorneys' Fees and Costs in Preservation Cases

Prior to 1980, NHPA did not provide for the award of attorneys' fees or costs. Without this explicit statutory authority, plaintiffs' ability to obtain fees and costs was limited. One court held that attorneys' fees and costs

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[266] *Id.* at § 4.

[267] Executive Order No. 13,007, § 1, 61 Fed. Reg. 26,711 (1996).

[268] *Id.* at § 2.

[269] Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments, April 29, 1994.

would be allowed in NHPA actions only in cases of bad faith or when there would be a "benefit to a limited class of special beneficiaries against whom the award is taxed."[270]

In 1980, Congress added Section 305 to NHPA authorizing the award of attorneys' fees and costs to any person who "substantially prevails" in any civil action to enforce the act.[271] Since then, there have been several decisions on attorneys' fees and costs. In one case, plaintiffs were successful in their suit to require the Department of Housing and Urban Development to comply with Section 106. Although the Federal agency had completed its compliance just a few days before the enactment of Section 305, the court awarded fees, holding that retroactive application of Section 305 would not result in injustice. Responsibility for the fees was shared by the Federal and local agency defendants.[272]

In other cases litigated since 1980, courts have also awarded attorneys' fees and costs.[273] In one early case, the court held that fees must be adequate to attract counsel to cases in which damages may be small, although the fees may not constitute a windfall.[274] Even in cases resolved through consent decrees, an award of attorneys' fees and costs is appropriate under NHPA.[275] Comparing NHPA's provisions for attorneys' fees with that of other statutes, the court determined that, when a case is not decided on the merits, courts must examine two issues to determine if plaintiffs substantially prevailed: 1) whether plaintiffs substantially received the relief sought; and 2) whether the lawsuit was a substantial factor in attaining the relief. If the test is satisfied, the court may, at its discretion, award attorneys' fees and costs, provided such an award furthers the purpose of NHPA.[276] Indeed, one case held that even plaintiffs who did not "win" were entitled to fees because the property had been listed in the National Register as a result of their efforts.[277] Finally, one early court decision also held that Section 305 is not limited to legal services rendered in a district court; an appellate court may award fees and costs for services in

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[270]Committee on Civic Rights of the Friends of the Newburyport Waterfront v. Romney, 518 F.2d 71 (1st Cir. 1975). Fees and costs were also sought under other authorities in preservation cases. *See* United States v. 4.18 Acres of Land, 542 F.2d 786 (9th Cir. 1976) (fees denied in condemnation case involving preservation issues); Black Hills Alliance v. Regional Forester, 526 F. Supp. 257 (D.S.D. 1981) (costs granted under Fed. R. Civ. P. 54).

[271]16 U.S.C. § 470w-4 (1994).

[272]WATCH v. Harris, 535 F. Supp. 9 (D. Conn. 1981).

[273]Attorney's fees have been awarded, for example, in 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. April 26, 1993) and Ferris v. Secretary of the United States Dep't of Transp., No. 89-C-779-C (W.D. Wis. 1990). *See also* Fill the Pool Comm. v. Village of Johnson City, No. 82-CV-762 (N.D.N.Y. June 23, 1983). [Ed. note: NHPA fees are based on market rate, in contrast to the Equal Access to Justice Act, 28 U.S.C. § 2412 (1994), and are applicable to NEPA and to § 4(f) of the Department of Transportation Act, which sets a low flat hourly rate adjusted for inflation.]

[274]National Trust for Historic Preservation v. United States Army Corps of Eng'rs, 570 F. Supp. 465 (S.D. Ohio 1983).

[275]Save the Tivoli, Inc. v. United States Dep't of Hous. & Urban Dev., Civ. No. 83-1281 (D.D.C. Oct. 16, 1986).

[276]*Id.*

[277]Paulina Lake Historic Cabin Owners Ass'n v. United States Dep't of Agric., Forest Serv., 577 F. Supp. 1188 (D. Or. 1983).

the appellate court.[278] Section 305 has also been the basis for finding that NHPA permits a private right of action.[279]

# VIII. Related Authorities Involving Historic Preservation

Although the National Historic Preservation Act is the Nation's principal historic preservation statute, there are other Federal authorities that include the preservation of historic resources among their purposes and goals. These statutes include the National Environmental Policy Act of 1969,[280] the Department of Transportation Act,[281] the Historical and Archeological Data Preservation Act of 1974,[282] the Archeological Resources Protection Act of 1979,[283] the Native American Graves Protection and Repatriation Act,[284] and the American Indian Religious Freedom Act.[285] This report focuses on the courts' interpretations of the preservation requirements of the National Environmental Policy Act and the transportation authorities because they are closely related to the preservation review process embodied in Section 106.[286] A brief summary of the other statutes is also provided.[287]

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[278]Morris County Trust for Historic Preservation v. Pierce, 730 F.2d 94 (3d Cir. 1983).

[279]Vieux Carré Property Owners, Residents & Assocs. v. Brown, 875 F.2d 453 (5th Cir. 1989), *cert. denied,* 493 U.S. 1020 (1990); North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992); Bywater Neighborhood Ass'n v. Tricarico, 879 F.2d 165 (5th Cir. 1989), *cert. denied,* 494 U.S. 1004 (1990); Boarhead Corp. v. Erickson, 726 F. Supp. 607 (E.D. Pa. 1989), *aff'd,* 923 F.2d 1011 (3d Cir. 1991). *But see* National Trust for Historic Preservation v. Blanck, Civ. Action No. 94-1091 (PLF) (D.D.C. Sept. 13, 1996).

[280]42 U.S.C. § § 4321-4335 (1994).

[281]49 U.S.C. § 303 (1994). *See also* Intermodal Surface Transportation Efficiency Act of 1991, 23 U.S.C. § § 101(a) and 133 (1994).

[282]16 U.S.C. §§ 469-469c (1994).

[283]16 U.S.C. §§ 470aa-470ll (1994).

[284] 25 U.S.C. §§3001-3013 (1994).

[285] 42 U.S.C. §§ 1996-1996a (1994).

[286]This report does not include a discussion of or citations to the many cases decided under these laws that do not address historic preservation but that deal with other aspects of the statutes.

[287]The statutes discussed in Section VIII.C. have generated relatively little litigation. Only those cases raising NHPA claims as well as claims under the statutes in that section are cited.

## A. The National Environmental Policy Act

The National Environmental Policy Act (NEPA) establishes a national policy of environmental protection.[288] To effectuate this policy, the act requires the Federal Government to carry out its plans and programs in such a way as to "preserve important historic, cultural, and natural aspects of our national heritage."[289] Generally, in order to ensure that environmental concerns are considered in agencies' decisionmaking, NEPA directs Federal agencies to prepare an environmental impact statement (EIS) for every "major Federal action significantly affecting the quality of the human environment."[290] The EIS must contain a detailed discussion of the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided if the proposal is implemented, alternatives to the proposed action, and other information. When uncertain as to whether to prepare an EIS, agencies customarily conduct preliminary analyses and complete an Environmental Assessment (EA) to inform their decision.[291]

Both NEPA and NHPA require agencies to take environmental considerations, including historic properties, into account in their decisionmaking. Courts have described both statutes as procedural statutes containing "stop, look, and listen" provisions requiring the collection of information; they have also described the courts' role in reviewing agency decisions as that of ensuring that agencies follow the procedures implementing those statutes.[292] In many circumstances where historic properties are involved in large Federal undertakings, if one statute applies, the other will also.[293] This is not always the case, however, for the statutes have different threshold requirements. While Section 106 applies to *any* Federal undertaking affecting historic properties, NEPA requires an EIS only for "major" Federal actions "significantly" affecting the quality of the human environment. Consequently, there may be instances where NHPA applies but no EIS under NEPA is required.[294] Most courts agree that NEPA and

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[288]Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982).

[289]42 U.S.C. § 4331(b)(4) (1994).

[290]42 U.S.C. § 4332(2)(C) (1994).

[291]More specifically, the process is as follows: If an agency determines that a proposed action is neither adequately covered by an existing NEPA document nor subject to a categorical exclusion, the agency must, at a minimum, prepare an EA to determine whether the action will significantly impact the environment. If the EA supports a Finding of No Significant Impact (FONSI), the agency documents that determination and proceeds with the action. If the agency does not reach a FONSI, it must publish a Notice of Intent to prepare an EIS and begin the scoping process. An agency may opt to proceed directly to preparation of an EIS, without preparing an EA.

[292]Gettysburg Battlefield Preservation Ass'n v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993); Walsh v. United States Army Corps of Eng'rs, 757 F. Supp. 781 (W.D. Tex. 1990); Connecticut Trust for Historic Preservation v. Interstate Commerce Comm'n, 841 F.2d 479 (2d Cir. 1988); Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987).

[293]The Council's regulations encourage agencies to coordinate their NEPA review with their compliance under § 106 of NHPA. 36 C.F.R. § 800.14(a) (1995).

[294]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) (court noted that NEPA threshold appeared higher than NHPA).

NHPA are separate statutes imposing distinct requirements that must be met individually. Some courts have held that, even though an EIS discusses historic resources, it is not sufficient for compliance with NHPA[295] or, for that matter, Executive Order No. 11593.[296] Many courts, however, have interpreted NEPA and NHPA similarly and applied the same reasoning in addressing claims under each statute;[297] some have described major Federal actions and undertakings as essentially coterminous.[298]

Cases addressing historic preservation concerns under NEPA generally fall into two categories: 1) cases discussing whether the agency action is a major Federal action significantly affecting the human environment, thereby requiring an EIS; or 2) cases discussing whether the agency properly conducted an environmental review for the major Federal action. Courts generally defer to agency decisions with regard to the application of NEPA, overturning such decisions only upon finding that the agency acted arbitrarily or capriciously, abused its discretion, or acted otherwise not in accordance with the law. As a result, in cases that challenge agency decisions that NEPA does not apply, courts often agree with agency determinations,[299] as long as the record indicates that the Federal agency took the requisite "hard look" at the potential impacts.[300] Although courts are not in agreement as to the amount of Federal involvement necessary to trigger NEPA,[301] courts have declined to apply NEPA and its EIS requirement where Federal involvement was limited to approving and providing financial assistance for

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[295]Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982); Bayou St. John Improv. Ass'n v. Sands, No. 81-1358 (E.D. La. May 28, 1981), *injunction modified*, [1983] 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,011 (June 17, 1982); National Indian Youth Council v. Andrus, 501 F. Supp. 649 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981); Cobble Hill Ass'n v. Adams, 470 F. Supp. 1077 (E.D.N.Y. 1979). *Contra*, Environmental Defense Fund v. Tenn. Valley Auth., 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd per curiam*, 492 F.2d 466 (6th Cir. 1974).

[296]Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974).

[297]Gettysburg Battlefield Preservation Ass'n v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993); Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n, 959 F.2d 508 (4th Cir. 1992); Village of Los Ranchos v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); People for Responsible Omaha Urban Dev. v. Interstate Commerce Comm'n, 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).

[298]Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n, 959 F.2d 508 (4th Cir. 1992); Village of Los Ranchos v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987).

[299]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 Ass'n v. Christopher, 49 F.3d 750 (D.C. Cir. 1995); Gettysburg Battlefield Preservation Ass'n v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993); Village of Los Ranchos v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); People for Responsible Omaha Urban Dev. v. Interstate Commerce Comm'n, 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); Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990); Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987).

[300]*See, e.g.*, West Branch Valley Flood Protection Ass'n v. Stone, 820 F. Supp. (D.D.C. 1993).

[301]Village of Los Ranchos v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

a local environmental study,[302] certifying a power facility where the facility could have relied on self-certification,[303] approving a contract even though approval was not necessary,[304] approving a land exchange,[305] reviewing plans to realign sewers,[306] and deciding not to exercise veto authority.[307] Courts have also approved agency decisions to treat certain actions as categorical exclusions under NEPA.[308] However, in one case, the court found the categorical exclusion decision unreasonable where the agency did not properly conduct identification of the project site;[309] the court in this case determined that an EIS was appropriate given that the project had the potential to affect a traditional cultural resource. In deciding whether a Federal action will have a significant impact, courts have held that mitigation measures may be considered,[310] although Council on Environmental Quality (CEQ) guidance warns agencies not to rely on the possibility of mitigation to avoid preparation of an EIS.[311] CEQ regulations establish certain criteria to assist agencies in determining the intensity of impacts. An impact may exceed the significance threshold depending on the degree to which it affects the "unique characteristics of the geographic area such as proximity to historic or cultural resources" or "districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places . . . ."[312] One court held that if a property is listed in the National Register or is of historic value, its proposed demolition is a "major Federal action" under NEPA, although it is not necessarily one "significantly affecting the quality of

[302]*Id.*

[303]Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n, 959 F.2d 508 (4th Cir. 1992).

[304]Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987).

[305]Gettysburg Battlefield Preservation Ass'n v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993).

[306]People for Responsible Omaha Urban Dev. v. Interstate Commerce Comm'n, 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).

[307]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 Ass'n v. Christopher, 49 F.3d 750 (D.C. Cir. 1995).

[308]City of Grapevine v. Department of Transp., 17 F.3d 1502 (D.C. Cir.), *cert. denied*, 115 S. Ct. 635 (1994); 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).

[309]El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991).

[310]Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993) (court found that permit conditions obviated need for EIS because conditions reduced impact of the project).

[311]Council on Environmental Quality Memorandum to Agencies Containing Answers to 40 Most Asked Questions on NEPA Regulations, 46 Fed. Reg. 18,026-38 (1981).

[312]40 C.F.R. § 1508.27 (b)(3), (8) (1995).

the human environment."[313] Other courts, however, have upheld agencies' determinations that projects involving demolition of or other impacts on historic properties are not major Federal actions.[314] Thus, an EIS was not required.

When EAs and EISs are prepared, plaintiffs may challenge their content and scope. Issues raised by plaintiffs include an agency's failure to consider cumulative impacts,[315] improper consideration of alternatives,[316] and inadequate analysis of mitigation measures.[317] If an EIS is prepared, the courts have held that it must include a thorough discussion of the historic and archeological resources involved in the project,[318] the impact of the project on those resources,[319] and alternatives that would allow for their preservation and rehabilitation.[320]

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[313]Committee to Save the Fox Bldg. v. Birmingham Branch of the Fed. Reserve Bank, 497 F. Supp. 504 (N.D. Ala. 1980). *But see* Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985) ("major Federal action" does not have meaning independent of "significantly affecting the quality of the human environment").

[314]Aertson v. Landrieu, 488 F. Supp. 314 (D. Mass.), *aff'd*, 637 F.2d 12 (1st Cir. 1980) (demolition in and adjacent to historic district); Nehring v. Harris, No. 79-C-1182 (N.D. Ill. Apr. 12, 1979), *dismissed*, 605 F.2d 559 (7th Cir. 1979) (demolition of eligible property). In one early decision, Saint Joseph Historical Soc'y v. Land Clearance for Redev. Auth., 366 F. Supp. 605 (W.D. Mo. 1973), the court found that NEPA was not applicable because the historic properties at issue had not been listed in the Register.

[315]City of Grapevine v. Department of Transp., 17 F.3d 1502 (D.C. Cir.), *cert. denied*, 115 S. Ct. 635 (1994) (court found that agency considered cumulative impacts of most elements of project, but those elements not considered could not be included in approved plan); Walsh v. United States Army Corps of Eng'rs, 757 F. Supp. 781 (W.D. Tex. 1990) (court upheld agency study where EIS included analysis of cumulative impacts of proposed actions, but not cumulative impacts of "contemplated" actions).

[316]City of Grapevine v. Department of Transp., 17 F.3d 1502 (D.C. Cir.), *cert. denied*, 115 S. Ct. 635 (1994); Communities, Inc. v. Busey, 956 F.2d 619 (6th Cir.), *cert. denied*, 506 U.S. 953 (1992).

[317]Communities, Inc. v. Busey, 956 F.2d 619 (6th Cir.), *cert. denied*, 506 U.S. 953 (1992) (court upheld agency EIS that identified and discussed potential mitigation measures, even though EIS did not specify which mitigation measures would be adopted); 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) (court found agency in compliance with NEPA where EIS addressed several mitigation measures and agency implemented substantial site-specific mitigation measures which had not been incorporated into EIS).

[318]Bayou St. John Improv. Ass'n v. Sands, No. 81-1358 (E.D. La. May 28, 1981), *injunction modified*, [1983] 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,011 (June 17, 1982) (levee improvements); National Indian Youth Council v. Andrus, 501 F. Supp. 649 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981) (mining); Montana Wildlife Fed'n v. Morton, 406 F. Supp. 489 (D. Mont. 1976) (road); Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974) (dam). *But see* James v. Lynn, 374 F. Supp. 900 (D. Colo. 1974) (EIS did not discuss historic resources; court declined to issue injunction because building still stood and plans could be changed). *See also* 40 C.F.R. §§ 1502.16(g), 1508.27(b)(8) (1995).

[319]Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982) (urban renewal); 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) (motorcycle race); Bayou St. John Improv. Ass'n v. Sands, No. 81-1358 (E.D. La. May 28, 1981), (*injunction modified*, [1983] 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,011 (June 17, 1982) (levee improvements); 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) (community development); Wisconsin Heritages, Inc. v. Harris, 460 F. Supp. 1120 (E.D. Wis. 1978), 490 F. Supp. 1334 (1980) (urban renewal); Libby

However, courts have held that an EIS was adequate even though its discussion of historic resources was incomplete because the agency had planned additional archeological surveys and could avoid harming the resources until new surveys were conducted.[321] Another court declined to require an agency to revise an existing EIS to include discussion of historic impacts because plaintiffs had waited too long to assert their claims.[322] Yet another court declined to require an EIS to discuss historic resources because the evidence on historic resources developed at trial was sufficient to inform the agency of the historic impacts.[323]

Courts are in disagreement as to whether a supplemental EIS must be prepared when new information regarding historic resources comes to light after completion of the initial EIS. One court held that a supplemental EIS is required when new historic resources are discovered[324] though others have held this may not be so sufficient a change as to require a supplemental EIS.[325] When a property is determined eligible for the National Register after the EIS is published, one court held that the necessity of a supplemental EIS must be newly determined.[326]

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Rod & Gun Club v. Poteat, 457 F. Supp. 1177 (D. Mont. 1978) (dam); Aluli v. Brown, 437 F. Supp. 602 (D. Hawaii 1977), *aff'd in part, rev'd in part on other grounds,* 602 F.2d 876 (9th Cir. 1979) (military operations); Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99 (N.D. Ga. 1975), *supp. order,* 414 F. Supp. 121 (1976), *aff'd per curiam sub nom.* Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth., 576 F.2d 573 (5th Cir. 1978) (mass transit system); Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974), *aff'd,* 621 F.2d 1017 (9th Cir. 1980) (dam); Environmental Defense Fund v. Tenn. Valley Auth., 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd per curiam,* 492 F.2d 466 (6th Cir. 1974) (dam).

[320]Wisconsin Heritages, Inc. v. Harris, 460 F. Supp. 1120 (E.D. Wis. 1978), 490 F. Supp. 1334 (1980) (urban renewal); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975) (urban renewal); Boston Waterfront Residents Ass'n v. Romney, 343 F. Supp. 89 (D. Mass. 1972) (waterfront development).

[321]Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974) (dam); 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).

[322]Wisconsin Heritages, Inc. v. Harris, 490 F. Supp. 1334 (E.D. Wis. 1980) (the court reasoned that plaintiffs should have brought their concerns about the historic properties to the attention of the agency during the time the EIS was being prepared; the EIS must be judged in light of the information available to the agency at the time it prepared the EIS).

[323]James v. Lynn, 374 F. Supp. 900 (D. Colo. 1974).

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

[325]Natural Resources Defense Council v. City of New York, 528 F. Supp. 1245 (S.D.N.Y. 1981), *aff'd,* 672 F.2d 292 (2d Cir.), *cert. dismissed,* 456 U.S. 920 (1982); Inman Park Restor., Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99 (N.D. Ga. 1975), *supp. order,* 414 F. Supp. 121 (1976), *aff'd per curiam sub nom.* Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth., 576 F.2d 573 (5th Cir. 1978). *See also* West Branch Valley Flood Protection Ass'n v. Stone, 820 F. Supp. 1 (D.D.C. 1993); Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992), *aff'd,* 990 F.2d 729 (2d Cir. 1993).

[326]WATCH v. Harris, 603 F.2d 310 (2d Cir. *cert. denied,* 444 U.S. 995 (1979).

## B. Transportation Authorities

Several statutes governing the actions of the Department of Transportation and its subagencies—the Federal Highway Administration, the Coast Guard, the Federal Aviation Administration and the Federal Transit Administration, among them—include strong historic preservation measures.[327] The language in these authorities was originally enacted as Section 4(f) of the Department of Transportation Act, signed into law the same day as NHPA: October 15, 1966.[328] Although Section 4(f) has been recodified as Section 303 of Title 49 of the United States Code, the preservation provision is still known as "Section 4(f)." As it pertains to historic properties, Section 4(f) only permits the Secretary of Transportation to approve a project that requires the use of land from a historic site if 1) there is no feasible and prudent alternative to the use of that land and 2) the program includes all possible planning to minimize harm to that historic site. The courts have held that it is premature for an agency to comply with Section 4(f) if project plans are not final; the expectation that future planning will minimize harm to historic property does not relieve the agency of its Section 4(f) compliance responsibilities.[329]

Section 4(f) applies only if the project at issue will "use" land from a parkland or a historic site. The meaning of the term "use" has been the subject of numerous lawsuits involving Section 4(f) and, as a result, is well defined.[330] A few courts have specifically addressed the meaning of "use" in the context of historic resources. Courts have held that demolition of a historic structure[331] or removal of part of a historic property constitutes a use of land from a historic site.[332] Other courts found that where there will be no physical use, plaintiffs may attempt to show "constructive use" of a property by presenting evidence of an impact that would substantially impair the value of the property in terms of its use and enjoyment.[333] Courts have recognized noise, pollution, and visual intrusion as constructive uses.[334] However, two courts have specifically declined to recognize constructive use in the case of airport noise impacts on historic neighborhoods, where the average noise levels were less than

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[327] *See, e.g.*, Department of Transportation Act, 49 U.S.C. § 303 (1994) and Federal-Aid Highway Act of 1968, 23 U.S.C. § 138 (1994).

[328] Department of Transportation Act, § 4(f), Pub. L. No. 89-670, 80 Stat. 931, 933 (1966).

[329] District of Columbia Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), *supp. op.*, 459 F.2d 1263, *cert. denied*, 405 U.S. 1030 (1972).

[330] These cases are beyond the scope of this report. See 23 C.F.R. § 771.135(p) (1994).

[331] Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784 (9th Cir. 1983).

[332] Ferris v. Secretary of the United States Dep't of Transp., No. 89-C-779-C (W.D. Wis. 1990) (removal of lens in lighthouse constituted use).

[333] Coalition Against a Raised Expressway, Inc. v. Dole, [1987] 17 Envtl. L. Rep. (Envtl. L. Inst.) 20,466 (S.D. Ala. Oct. 20, 1986).

[334] *Id.*

65 weighted average day and night sound level measurements (Ldn).[335] One early court decision rejected arguments that secondary impacts such as noise, air pollution, land-use alteration, blasting damage, and property value diminution would amount to a constructive use of historic buildings.[336] Further, one court has upheld a Federal Highway Administration (FHWA) regulation exempting archeological sites from Section 4(f) by allowing impacts on them to be mitigated by excavation first pursuant to Section 106 and then determined to be no longer in existence and, therefore, not "used."[337]

The meaning of the term "historic site" was discussed in a case involving a FHWA proposal to aid the construction of a highway through the Moanaloa Valley in Hawaii.[338] FHWA decided that the valley was not a historic site. It based its decision on a State board's finding that the valley was of marginal significance, disregarding both the Secretary of the Interior's determination that the valley might be eligible for the National Register and the Council's conclusion that the valley possessed historic significance. The court held that a property did not have to be listed in the National Register to be a historic site under Section 4(f), that a property likely to meet the National Register criteria is sufficient.[339] Indeed, 4(f) applies to historic sites of national, State, or local significance.[340] Furthermore, the Federal determination of eligibility took precedence over the State board's finding and thus triggered Section 4(f).

Agencies must determine whether historic sites are involved prior to approval of the project[341] and early enough in the process that alternatives to the project are still possible.[342] In one case, plaintiffs alleged that a Section 4(f) statement was made too early in the process, but the court found the timing of the statement adequate because the agency had begun consideration of the alternative in question by the time the statement was prepared.[343] Moreover, the statement called for continual review of the alternative. No formal determination of

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[335]City of Grapevine v. Department of Transp., 17 F.3d 1502 (D.C. Cir.), *cert. denied,* 115 S. Ct. 635 (1994); Communities, Inc. v. Busey, 956 F.2d 619 (6th Cir.), *cert. denied,* 506 U.S. 953 (1992).

[336]Nashvillians Against I-440 v. Lewis, 524 F. Supp. 962 (M.D. Tenn. 1981) (court held that the claimed harm must be to the historic value or quality of the properties).

[337]Town of Belmont v. Dole, 766 F.2d 28 (1st Cir. 1985), *cert. denied,* 474 U.S. 1055 (1986). *See also* 23 C.F.R. § 771.135 (p) (1995).

[338]Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir.), *cert. denied,* 429 U.S. 999 (1976).

[339]*But see* Nashvillians Against I-440 v. Lewis, 524 F. Supp. 962 (M.D. Tenn. 1981) (compliance with § 4(f) not required for every property within the scope of § 106 of NHPA).

[340]49 U.S.C. § 303(c) (1994).

[341]Blue Grass Land & Nature Trust, Inc. v. Adams, No. 77-65 (E.D. Ky. Sept. 7, 1979).

[342]Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784 (9th Cir. 1983).

[343]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).

eligibility from the Secretary of the Interior is required.[344] In one case, the court of appeals upheld Federal regulations that exempted FHWA from Section 4(f) compliance where the historic resources—archeological sites—were important for the data they contained, not for their location.[345] Section 4(f) did not apply, even though the property had been listed in the National Register.

## C. Other Statutes

### 1. Historical and Archeological Data Preservation Act of 1974 (HADPA)[346] and Archeological Resources Protection Act of 1979 (ARPA)

HADPA provides for the preservation of historical and archeological data that might otherwise be lost as the result of alterations to the terrain caused by a Federal or federally licensed activity or program.[347] To carry out the purposes of the act, HADPA allows for the transfer of up to one percent of the appropriations for the project to the Secretary of the Interior. Unlike Section 106, which mandates consideration of historic properties during Federal agency planning, HADPA guides the implementation of mitigation measures once an agency decision is reached.

ARPA is designed to protect archeological resources on Federal and Indian lands and to encourage the exchange of information pertaining to such properties between the Federal Government and the archeological community.[348] ARPA strengthens its predecessor HADPA by providing specific permit procedures that all persons, including private applicants as well as State and Federal agencies, must follow prior to excavating or removing any archeological resource on Federal or Indian lands.[349] Unlike NHPA, ARPA provides both civil and criminal penalties for failure to comply with the act.[350] ARPA does contain a confidentiality provision similar to NHPA.[351]

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[344]Blue Grass Land & Nature Trust, Inc. v. Adams, No. 77-65 (E.D. Ky. Sept. 7, 1979).

[345]Town of Belmont v. Dole, 766 F.2d 28 (1st Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986); *see* 23 C.F.R. § 771.135(g) (1995).

[346]The act is also known as the "Archeological Recovery Act" or the "Moss-Bennett Act."

[347]16 U.S.C. § 469-469c (1994).

[348]16 U.S.C. § 470aa (1994).

[349]16 U.S.C. § 470bb(6) (1994). The act has been interpreted to apply to "purposeful" excavation and removal of archeological resources. Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990).

[350]16 U.S.C. § 470ee, 470ff (1994).

[351]16 U.S.C. § 470gg (1994).

### 2. Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)

NAGPRA requires Federal agencies and museums to inventory their holdings of Native American cultural items and return such items to Indian tribes and other Native American groups.[352] The definition of "Indian tribe" in NAGPRA has been interpreted to include an Indian group or community of Indians that the Secretary does not acknowledge as an Indian tribe.[353] However, this decision was reached prior to promulgation of NAGPRA regulations which generally define "Indian tribe" as those recognized by the Secretary of Interior.[354] The act also provides that any intentional excavation and removal of Native American human remains and other cultural items from Federal or tribal lands[355] be conducted only with a permit issued pursuant to the Archeological Resources Protection Act and after consulting with the appropriate tribe.[356] If an inadvertent discovery is made of Native American remains or objects in connection with an activity on Federal or tribal lands, the activity must cease in the area of the discovery, a reasonable effort must be made to protect the items discovered before resuming activity, and the appropriate Federal agency or tribal authority must be notified. Activities may resume 30 days after receiving certification of notification from the appropriate Federal agency or tribal authority.[357] NAGPRA requirements may overlay Section 106 when undertakings occur on Federal or tribal lands.

### 3. American Indian Religious Freedom Act of 1978 (AIRFA)

AIRFA protects the rights of Native Americans to exercise their traditional religions by ensuring access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[358] The intent of AIRFA has been interpreted as ensuring that Native Americans obtain First Amendment protection, but not to grant them rights in excess of the First Amendment.[359] Because such sites may be eligible

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[352]25 U.S.C. § 3003 (1994).

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

[354]60 Fed. Reg. 62,159 (Dec. 4, 1995) (to be codified at 43 C.F.R. pt. 10).

[355]Federal lands are defined in NAGPRA as "lands which are controlled or owned by the United States." 25 U.S.C.§ 3001(5) (1994). At least one court has declined to interpret "control" broadly and found that NAGPRA did not apply where the degree of Federal involvement was limited to issuance of a permit. Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993).

[356]25 U.S.C. § 3002(c) (1994). If the items are on tribal land then consent of the tribe must be obtained prior to excavations.

[357]25 U.S.C. § 3002(d)(1) (1994).

[358]42 U.S.C. § 1996 (1994).

[359]Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990) (citing Crow v. Gullet, 541 F. Supp. 785 (D.S.C. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983) (court found that AIRFA does not create a cause of action in Federal courts for violation of religious freedom)). [Ed. note: The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b) (1994), provides such judicial relief.]

for inclusion in the National Register, any effects that may occur, as a result of providing access to them, may trigger Section 106 review under NHPA.[360]

# IX. Procedural Questions in Litigating Preservation Cases

Defendants in historic preservation cases occasionally raise procedural questions in defending agency decisionmaking against claims that agencies have violated NHPA and other historic preservation laws. Among these are the issues of jurisdiction, standing, laches, ripeness, mootness, and the scope of judicial review.

## A. Jurisdiction

The question of a court's jurisdiction to hear a matter has two aspects. First, the court must determine whether it has personal jurisdiction over the defendants named in the suit. Although it is clear that a Federal court may assume jurisdiction over Federal agencies, the court must inquire further when non-Federal defendants are involved. Federal courts have assumed jurisdiction over non-Federal defendants when they are named with Federal defendants or the non-Federal parties have taken advantage of benefits conferred by Federal law or are otherwise associated with a Federal agency.[361] Most of these non-Federal parties are applicants for permits, licenses, or financial assistance. Plaintiffs most often bring suit against the Federal defendant, alleging violation of Section 106 and other Federal laws to enjoin the non-Federal defendant from taking the threatening action. Other courts, however, have found that they lack jurisdiction to enjoin non-Federal parties despite their association with a Federal agency.[362] An individual or group claiming an interest in the property which is the subject of the suit, or whose claim or defense shares a common question of law or fact with a claim or defense

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[360]AIRFA was augmented by the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b) (1994), which established statutory standards for free exercise rights "substantially burdened" by Federal, State, and local agency actions, and allowed plaintiffs to bring causes of action for violations of the act.

[361]Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993) (land owner sought to demolish historic structure purchased from FDIC); Pacific Gas Transmission Co. v. Richardson's Recreational Ranch, 773 F. Supp. 246 (D. Or. 1991) (land owner denied plaintiff access to land to conduct survey), *aff'd*, 9 F.3d 1394 (9th Cir. 1993); North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992) (HUD regulations required grant receiving city to comply with NHPA); El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991) (company constructing electric substation with funds provided by Rural Electrification Administration); Weintraub v. Rural Elec. Admin., 457 F. Supp. 78 (M.D. Pa. 1978) (non-Federal parties had borrowed money from Federal agency); River v. Richmond Metro. Auth., 359 F. Supp. 611 (E.D. Va.) (non-Federal parties had received Federal assistance for other parts of highway project), *aff'd per curiam*, 481 F.2d 1280 (4th Cir. 1973).

[362]Vieux Carré Property Owners, Residents & Assocs. v. Brown, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990) (recipient of Corps permit); Gettysburg Battlefield Preservation Ass'n v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992) (exchanged land with National Park Service), *aff'd*, 989 F.2d 487 (3d Cir. 1993); Bywater Neighborhood Ass'n v. Tricarico, 879 F.2d 165, 167 n.7 (5th Cir. 1989) (owners of FCC licensed facility), *cert. denied*, 494 U.S. 1004 (1990); Edwards v. First Bank of Dundee, 534 F.2d 1242 (7th Cir. 1976) (federally insured bank).

in the suit, may be allowed to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure.[363] If the court permits the non-party to intervene, it can fully litigate the merits of the suit.

The second question for the court to determine is whether it has subject matter jurisdiction. Most suits that allege violations of NHPA base jurisdiction on 28 U.S.C. § 1331, which grants jurisdiction to Federal district courts in civil actions arising under the laws of United States.[364] This grant of jurisdiction can, however, be preempted or limited by other statutes.[365] Jurisdiction can also be premised on the judicial review provisions of the Administrative Procedure Act (APA).[366] The defense of sovereign immunity does not preclude jurisdiction in cases involving NHPA violations.[367] When the parties to a dispute have claims other than those involving historic preservation, they may be heard under 28 U.S.C. § 1367, which gives the court discretion to exercise

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[363]*See, e.g.*, Native Americans for Enola v. United States Forest Serv., 832 F. Supp. 297 (D. Or. 1993) (logging company intervened as defendant), *vacated*, 60 F.3d 645 (9th Cir. 1995); Berkshire Scenic Ry. Museum v. Interstate Commerce Comm'n, 52 F. 3d 378 (1st Cir. 1995) (railroad operating company intervened); 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) (Republic of Turkey intervened as defendant), *aff'd in part, rev'd in part sub nom.* Sheridan Kalorama Historical Ass'n v. Christopher, 49 F.3d 750 (D.C. Cir. 1995); Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994) (University of Arizona intervened as appellee); People for Responsible Omaha Urban Dev. v. Interstate Commerce Comm'n, 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) (National Trust intervened).

[364]Section 1331 also grants courts jurisdiction to hear cases involving State law if the outcome depends upon construction of Federal law. Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993) (citing Smith v. Kansas City Title & Trust, 255 U.S. 180, (1921)).

[365]*See, e.g.*, National Trust for Historic Preservation v. Federal Deposit Ins. Corp., 995 F.2d 238 (D.C. Cir.) (finding that Federal Deposit Insurance Act denies all courts jurisdiction to act against FDIC in its role as conservator or receiver), *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); Boarhead Corp. v. Erickson, 923 F.2d 1011 (3d Cir. 1991) (holding that Comprehensive Environmental Response, Compensation, and Liability Act precluded subject matter jurisdiction); Friends of Sierra R.R. v. Interstate Commerce Comm'n, 881 F.2d 663 (9th Cir. 1989) (court did not have jurisdiction to review original claim because statutory time-limit of Administrative Order Review Act had expired), *cert. denied, sub nom.* Tuolumne Park & Recreation Dist. v. Interstate Commerce Comm'n, 493 U.S. 1093 (1990); Bywater Neighborhood Ass'n v. Tricarico, 879 F.2d 165 (5th Cir. 1989) (precluding Federal district court jurisdiction because Communications Act assigned exclusive jurisdiction to United States Courts of Appeals), *cert. denied*, 494 U.S. 1004 (1990).

[366]5 U.S.C. §§ 701-706 (1994); Vieux Carré Property Owners, Residents & Assocs. v. Brown, 875 F.2d 453 (5th Cir. 1989), *cert denied*, 493 U.S. 1020 (1990); Illinois Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989); Committee to Save the South Green v. Hills, [1977] 7 Envtl. L. Rep. (Envtl. L. Inst.) 20,061 (D. Conn. Nov. 5, 1976); Save the Courthouse Committee v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975); River v. Richmond Metro. Auth., 359 F. Supp. 611 (E.D. Va.), *aff'd per curiam*, 481 F.2d 1280 (4th Cir. 1973). APA does not confer jurisdiction to a district court if another statute expressly precludes review.

[367]Indiana Coal Council v. Lujan, 774 F. Supp. 1385 (D.D.C. 1991), *vacated in part, appeal dismissed*, No. 91-5397 (D.C. Cir. Apr. 26, 1993).

supplemental jurisdiction over claims arising from the "same case or controversy" as the claim conferring jurisdiction to the court.[368]

## B. Standing

To maintain a suit in any court, plaintiffs must have standing. This necessity, which has its roots in the case or controversy provision of the United States Constitution,[369] requires that plaintiffs allege injury to an interest personal to them that is within the zone of interests protected by the statutes at issue. Although early opinions dismissed actions to enforce NHPA for lack of standing on grounds that plaintiffs had shown no real interest because none of them owned or had legal control over the historic properties in question,[370] or because of faulty complaints,[371] later cases have allowed standing more liberally, finding plaintiffs had demonstrated a real interest in the case through their involvement in the administrative process.[372]

The first requirement, injury-in-fact, is not limited to economic injury.[373] Plaintiffs need not show ownership of the property involved, but may base standing on the threatened demolition of a historic building;[374] injury to

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[368]Section 1367 is the codification of the common law doctrines of ancillary and pendent jurisdiction. Pursuant to those doctrines, jurisdiction was granted in Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978) (intervenor claim of breach of agreement), but was declined in River v. Richmond Metro. Auth., 359 F. Supp. 611 (E.D. Va.) (court declined to hear State constitutional claims), *aff'd per curiam*, 481 F.2d 1280 (4th Cir. 1973). *See also* Gettysburg Battlefield Preservation Ass'n v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993); 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) (court declines to exercise supplemental jurisdiction).

[369]U.S. Const. Art. III, § 2, cl. 1. Article III standing requires that plaintiffs allege that 1) they have suffered an injury in fact; 2) the injury is fairly traceable to the action of the defendant, and 3) the injury will likely be redressed by a favorable decision. *See* North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992) (citing Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992)).

[370]South Hill Neighborhood Ass'n v. Romney, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970).

[371]See Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993) (plaintiff did not allege injury); Kent County Council for Historic Preservation v. Romney, 304 F. Supp. 885 (W.D. Mich. 1969) (complaint did not show sufficient interest).

[372]North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992). Occasionally standing is based on the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1994). *See* Ely v. Velde (Ely I), 451 F.2d 1130 (4th Cir. 1971); Blue Grass Land & Nature Trust, Inc. v. Adams, No. 77-65 (E.D. Ky. Sept. 7, 1979); Historic Preservation of Shreveport v. Dep't of Health, Educ., & Welfare, No. 78-0905 (W.D. La. Sept. 11, 1978); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975); River v. Richmond Metro. Auth., 359 F. Supp. 611 (E.D. Va.), *aff'd per curiam*, 481 F.2d 1280 (4th Cir. 1973).

[373]Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21 (6th Cir. 1980).

[374]Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993); Committee to Save the Fox Bldg. v. Birmingham Branch of the Fed. Reserve Bank, 497 F. Supp. 504 (N.D. Ala. 1980).

aesthetic,[375] architectural,[376] cultural,[377] environmental,[378] or historic values;[379] or injury to plaintiff's enjoyment or use of the property.[380] Injury common to the public at large does not defeat standing,[381] as long as plaintifff alleges a concrete and particularized legal interest.[382] Plaintiffs alleging such injury are within the zone of interests protected by NHPA and other historic preservation statutes.[383]

Standing has been granted to residents of towns in which an affected historic property was located,[384] particularly where the plaintiffs resided near the property,[385] and to organizations composed of members who

[375]North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992); Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784 (9th Cir. 1983); Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21 (6th Cir. 1980); Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978); Weintraub v. Rural Elec. Admin., 457 F. Supp. 78 (M.D. Pa. 1978); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975).

[376]North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992); Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21 (6th Cir. 1980).

[377]Weintraub v. Rural Elec. Admin., 457 F. Supp. 78 (M.D. Pa. 1978).

[378]Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978).

[379]Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784 (9th Cir. 1983).

[380]Committee to Save the South Green v. Hills, [1977] 7 Envtl. L. Rep. (Envtl. L. Inst.) 20,061 (D. Conn. Nov. 5, 1976); Ad Hoc Comm. to Save the Old Carnegie Lib'y Bldg. v. City of Atlanta, No. C77-541A (N.D. Ga. Apr. 7, 1977).

[381]Ad Hoc Comm. to Save the Old Carnegie Lib'y Bldg. v. City of Atlanta, No. C77-541A (N.D. Ga. Apr. 7, 1977).

[382]Streater v. United States Dep't of Transp., No. CIV. A. 95-2162 (E.D. Pa. Mar. 25, 1996) (court finds plaintiffs lack standing because, *inter alia*, they appeared to assert the interests of third parties).

[383]Vieux Carré Property Owners, Residents & Assocs. v. Brown, 875 F.2d 453 (5th Cir. 1989) *cert. denied*, 493 U.S. 1020 (1990); Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784 (9th Cir. 1983); Ely v. Velde (Ely I), 451 F.2d 1130 (4th Cir. 1971); Committee to Save the Fox Bldg. v. Birmingham Branch of the Fed. Reserve Bank, 497 F. Supp. 504 (N.D. Ala. 1980); Weintraub v. Rural Elec. Admin., 457 F. Supp. 78 (M.D. Pa. 1978); Ad Hoc Comm. to Save the Old Carnegie Lib'y Bldg. v. City of Atlanta, No. C77-541A (N.D. Ga. Apr. 7, 1977); Committee to Save the South Green v. Hills, [1977] 7 Envtl. L. Rep. (Envtl. L. Inst.) 20,061 (D. Conn. Nov. 5, 1976); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975); River v. Richmond Metro. Auth., 359 F. Supp. 611 (E.D. Va.), *aff'd per curiam*, 481 F.2d 1280 (4th Cir. 1973).

[384]El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991); Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975); Ely v. Velde (Ely I), 321 F. Supp. 1088 (E.D. Va.), *aff'd in part, rev'd in part on other grounds*, 451 F.2d 1130 (4th Cir. 1971).

[385]El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991); Weintraub v. Rural Elec. Admin., 457 F. Supp. 78 (M.D. Pa. 1978); Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978).

were residents or users of the affected property, as long as injury is alleged.[386] Organizations that allege only a general public interest in a property without further allegations of use and injury have been denied standing.[387] In suits brought by individuals and organizations, courts have denied standing to plaintiff organizations but granted standing to plaintiff individuals, finding their interests as individuals different from the interests of the group.[388] Similarly, a court recognized the right of members of a tribe to sue as individuals, even though the tribe as a whole was barred from suit due to a settlement agreement.[389] A State has been held to have standing to represent the interests of its citizens.[390]

Whether plaintiffs have standing under the "private attorney general" doctrine is not clear. One court held that plaintiffs who had not engaged sufficiently in the administrative process did not have the requisite special interest in the controversy to have standing.[391] Another court, however, allowed standing under this doctrine on the ground that plaintiffs had demonstrated injury to the public interest.[392]

Standing to enforce a Memorandum of Agreement executed under the Council's regulations or a memorandum of understanding made between an agency and a State regarding the treatment of historic properties has been treated differently. Earlier, courts generally concluded that plaintiffs who were not parties to these agreements lacked the necessary privity of contract to maintain an action to enforce the agreement's terms.[393] However, later cases alleging violations of an MOA indicate that citizen organizations have standing to challenge

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[386]*Id.*; Vieux Carré Property Owners, Residents & Assocs. v. Brown, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990); Waterford Citizens' Ass'n v. Reilly, 970 F.2d 1287 (4th Cir. 1992); Bywater Neighborhood Ass'n v. Tricarico, 879 F.2d 165 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21 (6th Cir. 1980); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975); River v. Richmond Metro. Auth., 359 F. Supp. 611 (E.D.Va.), *aff'd per curiam*, 481 F.2d 1280 (4th Cir.1973). *But see* Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993) (court found plaintiff organization did not properly allege injury).

[387]Sierra Club v. Morton, 405 U.S. 727 (1972).

[388]Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993).

[389]Attaki v. United States, 746 F. Supp. 1395 (D. Ariz. 1990).

[390]Commonwealth of Kentucky v. United States Army Corps of Eng'rs, No. 89-77 (E.D. Ky. Sept. 21, 1992; Pennsylvania v. Morton, 381 F. Supp. 293 (D.D.C. 1974). *See also* Weintraub v. Rural Elec. Admin., 457 F. Supp. 78 (M.D. Pa. 1978) (SHPO had standing).

[391]South Hill Neighborhood Ass'n v. Romney, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970). *But see* North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992) (court found plaintiff had real interest by demonstrating involvement in administrative process).

[392]Ely v. Velde (Ely I), 321 F. Supp. 1088 (E.D. Va.), *aff'd in part, rev'd in part on other grounds*, 451 F.2d 1130 (4th Cir. 1971).

[393]Citizens' Comm. for Envtl. Protection v. United States Coast Guard, 456 F. Supp. 101 (D.N.J. 1978); Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978). *But see* Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp., 642 F.2d 527 (D.C. Cir. 1980) (standing not at issue; court addressed plaintiffs' challenges to MOA).

compliance with such agreements.[394] Additionally, because the Council's regulations require an agency to return to the Council for further comments if the agency cannot implement an MOA,[395] failure to comply with the terms of the MOA may put the agency in violation of Section 106, a claim clearly actionable.

## C. Laches

Under the doctrine of laches, plaintiffs are barred from maintaining their lawsuits if they have unreasonably delayed in bringing the action and their delay would cause prejudice to defendants if the suit was allowed to go forward. In environmental cases, including those concerning historic preservation, defendants carry an especially heavy burden in attempting to convince the court that laches should apply.[396]

The length of the delay involved has varied considerably from case to case. A delay of two months was held to be too long in one case,[397] while a delay of eight years was considered reasonable in another.[398] Whether a delay is reasonable may depend on plaintiffs' efforts to solve their problems out of court. When plaintiffs have been diligent in making their views known to the agency, the defense of laches generally is not allowed.[399] Laches begins to run from the time it becomes reasonably clear to plaintiffs that further efforts to achieve their goals would be fruitless, not from the date on which the Federal decision was made or the demolition of a building was

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[394]Waterford Citizens' Ass'n v. Reilly, 970 F.2d 1287 (4th Cir. 1992); Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993); Washington Trust for Historic Preservation v. City of Seattle, No. C87-1506C (W.D. Wash. Feb. 25, 1988).

[395]36 C.F.R. §§ 800.6(c)(1) (1995).

[396]Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994); 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); River v. Richmond Metro. Auth., 359 F. Supp. 611 (E.D. Va.), *aff'd per curiam,* 481 F.2d 1280 (4th Cir. 1973). Some courts apply the 6-year statute of limitations in the Tucker Act, 28 U.S.C. § 2401(a) (1994), to environmental cases.

[397]Birmingham Realty Co. v. General Servs. Admin., 497 F. Supp. 1377 (N.D. Ala. 1980).

[398]Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982). *See also* Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99 (N.D. Ga. 1975), *supp. order*, 414 F. Supp. 121 (1976), *aff'd per curiam sub. nom.* Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth., 576 F.2d 573 (5th Cir. 1978) (laches did not bar suit although project had been publicized for 13 years).

[399]Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982) (8 years); Bayou St. John Improv. Ass'n v. Sands, No. 81-1358 (E.D. La. May 28, 1981), *injunction modified,* [1983] 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,011 (June 17, 1982) (1 year); Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978) (2 years); River v. Richmond Metro. Auth., 359 F. Supp. 611 (E.D. Va.), *aff'd per curiam,* 481 F.2d 1280 (4th Cir. 1973) (7 years). *But see* Citizens & Landowners Against the Miles City/New Underwood Powerline v. Secretary, United States Dep't of Energy, 513 F. Supp. 257 (D.S.D. 1981), *aff'd,* 683 F.2d 1171 (8th Cir. 1982) (plaintiffs involved over 2 years before bringing suit; court held they had delayed too long and laches applied).

first discussed.[400] In one case, 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.[401] The court explained that if the plaintiff had participated in the NHPA review process, many of the deficiencies alleged in the suit could have been corrected.[402]

The test for determining the application of laches involves a balancing of the prejudice to the defendants and the benefit to the public that would result from the suit.[403] When the buildings in question remained standing and the public interest in preservation could still be safeguarded, courts have rejected the laches defense.[404]

In some cases, courts have dismissed lawsuits because their maintenance would cause undue prejudice to defendants.[405] In one case, defendants had spent a considerable sum of money to acquire properties, foreclosed the opportunity to explore alternative sites, and begun demolition of the historic property. The court denied injunctive relief, holding that the plaintiffs' suit, coupled with their delay in bringing the action, unduly prejudiced the defendant.[406] Under other circumstances, even the expenditure of a great deal of time and money has not justified dismissal, particularly when the expenditure represented only a small percentage of the total to be spent and would not have been lost by further delay[407] and no construction had begun.[408] Even where construction is substantially complete, courts have acknowledged that a suit may still be allowed.[409] Additionally, where defendants continued construction while aware of plaintiffs concerns and failing to address them, a court is less

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[400]Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975).

[401]Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994).

[402]*Id.*

[403]*Id.*; Blue Grass Land & Nature Trust, Inc. v. Adams, No. 77-65 (E.D. Ky. Sept. 7, 1979); River v. Richmond Metro. Auth., 359 F. Supp. 611 (E.D. Va.), *aff'd per curiam,* 481 F.2d 1280 (4th Cir. 1973). *See also* City of Columbia v. Soloman, No. 78-2109 (D.S.C. June 12, 1979.

[404]WATCH v. Harris, 603 F.2d 310 (2d Cir.), *cert. denied,* 444 U.S. 995 (1979); Committee to Save the South Green v. Hills, [1977] 7 Envtl. L. Rep. (Envtl. L. Inst.) 20,061 (D. Conn. Nov 5, 1976); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975).

[405]Birmingham Realty Co. v. General Servs. Admin., 497 F. Supp. 1377 (N.D. Ala. 1980); Capitol Hill Restoration Soc'y v. Heimann, No. 80-0237 (D.D.C. July 31, 1980); City of Columbia v. Soloman, No. 78-2109 (D.S.C. June 12, 1979).

[406]Committee to Save the Fox Bldg. v. Birmingham Branch of the Fed. Reserve Bank, 497 F. Supp. 504 (N.D. Ala. 1980).

[407]Bayou St. John Improv. Ass'n v. Sands. No 81-1358 (E.D. La. May 28, 1981), *injunction modified,* [1983] 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,011 (June 17, 1982).

[408]Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99 (N.D. Ga. 1975), *supp. order,* 414 F. Supp. 121 (1976), *aff'd per curiam sub nom.* Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth., 576 F.2d 573 (5th Cir. 1978). *See also* WATCH v. Harris, 603 F.2d 310 (2d Cir.), *cert. denied.* 444 U.S. 495 (1979).

[409]See Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994).

likely to find undue prejudice to defendants.[410] Courts may also examine defendants' actions to determine if their conduct precluded notice and an opportunity for the public to make its concerns known earlier.[411]

## D. Ripeness and Mootness

When a suit is brought before an agency has had time to complete any historic review requirements, a court will dismiss it for lack of ripeness or failure to exhaust administrative remedies.[412] In at least one case, the court allowed an action even though plaintiffs had not exhausted their administrative remedies because the court determined 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.[413] In another case, the court rejected defendants' claim that the case should be dismissed and the agency be allowed to continue through the administrative process because the agency was willing to reopen consultation with the SHPO and Council; the court noted that the agency had not been willing to cooperate until the lawsuit was filed.[414]

When a suit is brought but the agency eliminates the historic review defects during the pendency of the action, a court will dismiss the case as moot.[415] Cases have also been dismissed as moot when the Federal involvement ceases and the court determines that it can no longer grant plaintiffs redress.[416] However, if there is still an opportunity to impact a project, even if a project is near completion and a permit already issued, courts will deny a motion to dismiss based on mootness.[417]

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[410]El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991).

[411]*Id. But see* Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994) (court barred plaintiff's claim due to laches after finding that Forest Service provided ample opportunities for plaintiff to voice concerns).

[412]Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99 (N.D. Ga 1975), *aff'd per curiam sub. nom.* Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth., 576 F.2d 573 (5th Cir. 1978).

[413]Sierra Club v. Watt, No. CV-83-5878 A WT(C.D. Cal. Nov. 18, 1983), *aff'd sub. nom.* Sierra Club v. Clark, 774 F.2d 1406 (9th Cir. 1985).

[414]El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991).

[415]Committee on Civic Rights of the Friends of the Newburyport Waterfront v. Romney, 518 F.2d 71 (1st Cir. 1975); Black Hills Alliance v. Regional Forester, 526 F. Supp. 257 (D.S.D. 1981); Don't Tear It Down, Inc. v. General Servs. Admin., 401 F. Supp. 1194 (D.D.C. 1975).

[416]Native Americans for Enola v. United States Forest Serv., 832 F. Supp. 297 (D.Or. 1993), *vacated*, 60 F.3d 645 (9th Cir. 1995) (logging covered by permit complete and permit expired); Gettysburg Battlefield Preservation Ass'n. v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993) (land exchange completed and private entities in control of property). *See also* 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).

[417]El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991) (court rejected mootness claim after finding that the damage done by defendants could be reversed and the site salvaged). *See also* Vieux Carré Property Owners, Residents & Assocs. 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.

## E. Scope and Standard of Review

When a court accepts jurisdiction of a controversy, it generally limits the scope of its review to the administrative record in existence.[418] Because this is so, courts hold that agencies should create a detailed record of their consideration of the effects of their undertakings on historic properties.[419] Under certain circumstances, courts will allow plaintiffs to supplement the agency record.[420]

When a court renders a decision on Federal agency compliance with NHPA, the court usually applies the "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" standard of review of the Administrative Procedure Act.[421] Some courts have found an implied private right of action through the attorneys' fees section of NHPA, but those decisions fail to clearly indicate what standard of review a court should apply

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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) (courts addressed mootness claim several times at various stages of proceeding).

[418]Berkshire Scenic Ry. Museum v. Interstate Commerce Comm'n, 52 F.3d 378 (1st Cir. 1995); Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995); City of Grapevine v. Dep't of Transp., 17 F.3d 1502 (D.C. Cir.), *cert. denied*, 115 S. Ct. 635 (1994); National Trust for Historic Preservation v. Federal Deposit Ins. Corp., 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); West Branch Valley Flood Protection Ass'n v. Stone, 820 F. Supp. 1 (D.D.C. 1993); Indiana Coal Council v. Lujan, 774 F. Supp. 1385 (D.D.C. 1991), *vacated in part, appeal dismissed*, No. 91-5397 (D.C. Cir. Apr. 26, 1993); Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n, 959 F.2d 508 (4th Cir. 1992); Communities, Inc. v. Busey, 956 F.2d 619 (6th Cir.), *cert. denied*, 506 U.S. 953 (1992); Boarhead Corp. v. Erickson, 726 F. Supp. 607 (E.D. Pa. 1989), *aff'd*, 923 F.2d 1011 (3d Cir. 1991); Friends of Sierra R.R. v. Interstate Commerce Comm'n, 881 F.2d 663 (9th Cir. 1989), *cert. denied sub nom.* Tuolumne Park & Recreation Dist. v. Interstate Commerce Comm'n, 493 U.S. 1093 (1990); Illinois Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989); 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); Techworld Dev. Corp. v. District of Columbia Preservation League, 648 F. Supp.106 (D.D.C. 1986); 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).

[419]Ely v. Velde (Ely I), 451 F.2d 1130 (4th Cir. 1971).

[420] *See* National Trust for Historic Preservation v. Blanck, Civ. Action No. 94-1091 (PLF) (D.D.C. Sept. 13, 1996); Citizens for the Scenic Severn River v. Skinner, 802 F. Supp. 1325 (D. Md. 1991) (court acknowledged that evidence outside the administrative record may be considered to explain the record or to determine whether appropriate factors were considered).

[421]5 U.S.C. § 706(2)(A) (1994).

where a private right of action is found.[422] The D.C. Circuit, in a 1996 decision, declined to find a private right of action under NHPA.[423]

## F. Remedies

In most preservation cases, the remedy sought has been a temporary restraining order[424] and a permanent[425] or preliminary injunction[426] against the Federal activity or Federal funding. In other cases, the remedy sought has

[422]Boarhead Corp. v. Erickson, 923 F.2d 1011 (3d Cir. 1991); Bywater Neighborhood Assoc. v. Tricarico, 879 F.2d 165 (5th Cir. 1989), *cert denied*, 494 U.S. 1004 (1990); Vieux Carré Property Owners, Residents and Assocs. v. Brown, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990) (even though court found implied private right of action, it still reviewed the Federal agency action under the APA standard of review); North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992).

[423]National Trust for Historic Preservation v. Blanck, Civ. Action No. 94-1091 (PLF) (D.D.C. Sept. 13, 1996).

[424]Temporary restraining orders granted in National Trust for Historic Preservation v. Federal Deposit Ins. Corp., 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); Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993); State of Kansas v. Adams, 608 F.2d 861 (10th Cir. 1979), *cert. denied sub nom.* Spannaus v. Goldschmidt, 445 U.S. 963 (1980); Fill the Pool Comm. v. Village of Johnson City, No. 82-CV-762 (HGM) (N.D.N.Y. Aug. 19, 1982); Citizens & Landowners Against the Miles City/New Underwood Powerline v. Secretary, United States Dep't of Energy, 513 F. Supp. 257 (D.S.D. 1981), *aff'd*, 683 F.2d 1171 (8th Cir. 1982); Bayou St. John Improv. Ass'n v. Sands, No. 81-1358 (E.D. La. May 28, 1981), *injunction modified*, [1983] 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,011 (June 17, 1982); Committee to Save the Fox Bldg. v. Birmingham Branch of the Fed. Reserve Bank, 497 F. Supp. 504 (N.D. Ala. 1980); Carson v. Alvord, 487 F. Supp. 1049 (N.D. Ga. 1980); Historic Preservation of Shreveport v. Department of Health, Educ., & Welfare, No. 78-0905 (W.D. La. Sept. 11, 1978); Committee to Save the South Green v. Hills, [1977] 7 Envtl. L. Rep. (Envtl. L. Inst.) 20,061 (D. Conn. Nov. 5, 1976); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975); Don't Tear It Down, Inc. v. General Servs. Admin., 401 F. Supp. 1194 (D.D.C. 1975).

Temporary restraining orders denied in Wicker Park Historic Dist. Preservation Fund v. Pierce, 565 F. Supp. 1066 (N.D. Ill. 1982); Birmingham Realty Co. v. General Servs. Admin., 497 F. Supp. 1377 (N.D. Ala. 1980); 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 on other grounds sub. nom.* Weinberger v. Barcelo, 456 U.S. 305 (1982); Cobble Hill Ass'n v. Adams, 470 F. Supp. 1077 (E.D.N.Y. 1979); Citizens' Comm. for Envtl. Protection v. United States Coast Guard, 456 F. Supp. 101 (D.N.J. 1978); Weintraub v. Rural Elec. Admin., 457 F. Supp. 78 (M.D. Pa. 1978); Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99 (N.D. Ga. 1975), *supp. order*, 414 F. Supp. 121 (1976), *aff'd per curiam sub nom.* Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth., 576 F.2d 573 (5th Cir. 1978).

[425]Permanent injunctions granted in Pacific Gas Transmission Co. v. Richardson's Recreational Ranch, 773 F. Supp. 246 (D. Or. 1991), *aff'd*, 9 F.3d 1394 (9th Cir. 1993); Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976); National Trust for Historic Preservation v. United States Army Corps of Eng'rs, 552 F. Supp. 784 (S.D. Ohio 1982); Commonwealth of 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); Thompson v. Fugate, 347 F. Supp. 120 (E.D. Va. 1972).

[426]Preliminary injunctions granted in El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991); Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990); Ferris v. Secretary of the United States Dep't of Transp., No. 89-C-779-C (W.D. Wis. 1989); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985); Fill the Pool

been review of agency decisions.[427] In the past, the courts have displayed some creativity in fashioning remedies.

Comm. v. Village of Johnson City, No. 82-CV-762 (HGM) N.D.N.Y. Aug. 19, 1982); Wisconsin Heritages, Inc. v. Harris, 460 F. Supp. 1120 (E.D. Wis. 1978), 490 F. Supp. 1334 (1980); Libby Rod & Gun Club v. Poteat, 457 F. Supp. 1177 (D. Mont. 1978); Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978); Committee to Save the South Green v. Hills, [1977] 7 Envtl. L. Rep. (Envtl. L. Inst.) 20,061 (D. Conn. Nov. 5, 1976); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975); Boston Waterfront Residents Ass'n v. Romney, 343 F. Supp. 89 (D. Mass. 1972).

Preliminary injunctions denied because agency complied with NHPA or other related laws in Native Americans for Enola v. United States Forest Serv., 832 F. Supp. 297 (D. Or. 1993), *vacated*, 60 F.3d 645 (9th Cir. 1995); Walsh v. United States Army Corps of Eng'rs, 757 F. Supp. 781 (W.D. Tex. 1990); Town of Belmont v. Dole, 766 F.2d 28 (1st Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986); 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); Northwest Indian Cemetery Protection Ass'n v. Peterson, 552 F. Supp. 951 (N.D. Cal.1982); National Indian Youth Council v. Andrus, 501 F. Supp. 649 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981); Catholic Action of Hawaii/Peace Educ. Project v. Brown, 468 F. Supp. 190 (D. Hawaii 1979), *rev'd sub. nom.* Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 643 F.2d 569 (9th Cir. 1980), *rev'd*, 454 U.S. 139 (1981); Central Okla. Preservation Alliance, Inc. v. Oklahoma City Urban Renewal Auth., 471 F. Supp. 68 (W.D. Okla. 1979); D.C. Fed'n of Civic Ass'ns v. Adams, 571 F.2d 1310 (4th Cir. 1978); Ely v. Velde (Ely I), 451 F.2d 1130 (4th Cir. 1971).

Injunction denied because NHPA inapplicable in Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993); Gettysburg Battlefield Preservation Ass'n v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993); 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); McMillan Park Comm. v. National Capital Planning Comm'n, 968 F.2d 1283 (D.C. Cir. 1992); Village of Los Ranchos v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); People for Responsible Omaha Urban Dev. v. Interstate Commerce Comm'n, CV-88-0-247 (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); Lee v. Thornburgh, 877 F.2d 1053 (D.C. Cir. 1989); Historic Preservation Guild v. Burnley, 896 F.2d 985 (6th Cir. 1989); Vieux Carré Property Owners, Residents & Assocs. v. Brown, 875 F.2d 453 (5th Cir. 1989); Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987); Techworld Dev. Corp. v. District of Columbia Preservation League, 648 F. Supp. 106 (D.D.C. 1986); Boyd v. Roland, 789 F.2d 349, (5th Cir. 1986); Committee to Save the Fox Bldg. v. Birmingham Branch of the Fed. Reserve Bank, 497 F. Supp. 504 (N.D. Ala. 1980); Weintraub v. Rural Elec. Admin., 457 F. Supp. 78 (M.D. Pa. 1978); Ad Hoc Comm. to Save the Old Carnegie Lib'y Bldg. v. City of Atlanta, No. C77-541A (N.D. Ga. Apr. 7, 1977); Saint Joseph Historical Soc'y v. Land Clearance for Redev. Auth., 366 F. Supp. 605 (W.D. Mo. 1973).

Injunction denied on other grounds in Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994) (NHPA claim barred by laches); National Trust for Historic Preservation v. Federal Deposit Ins. Corp., No. 93-0904 (D.D.C. May 7, 1993) (court lacked jurisdiction), *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); Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp., 642 F.2d 527 (D.C. Cir. 1980) (terms of MOA had been satisfied); Edwards v. First Bank of Dundee, 534 F.2d 1242 (7th Cir. 1976) (court lacked jurisdiction); Paulina Lake Historic Cabin Owners Ass'n v. United States Dep't of Agric. Forest Serv., 577 F. Supp. 1188 (D. Or. 1983) (agency stipulated that it would comply with NHPA); Aluli v. Brown, 437 F. Supp. 602 (D. Hawaii 1977), *aff'd in part, rev'd in part on other grounds*, 602 F.2d 876 (9th Cir. 1979) (plaintiffs had not shown irreparable injury); James v. Lynn, 374 F. Supp. 900 (D. Colo. 1974) (compliance with Exec. Order No. 11,593 would be a needless act); Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974) (although injunction denied, court ordered defendants not to disturb archeological sites).

[427] *See, e.g.*, Berkshire Scenic Ry. Museum v. Interstate Commerce Comm'n, 52 F.3d 378 (1st Cir. 1995) (court of appeals affirmed ICC abandonment exemption decision); 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

In one case, an appellate court remanded the case to the district court for selection of a remedy:[428] The State grant recipient could implement the project without compliance with the National Historic Preservation Act if it reimbursed the Federal Government for the money received for the project; could reapply for the Federal money knowing that the Federal agency must comply with NHPA; or could abandon the project altogether. If the State were to decline these alternatives, the court directed the district court to enter an injunction.

Courts have also directed agencies not to disturb historic resources even though they declined to issue injunctions.[429]

# X. Conclusion

In the 30 years since the passage of the National Historic Preservation Act, court decisions have focused on the application of NHPA to Federal agency projects, programs, and activities. Courts will examine the degree and nature of Federal involvement in a project in order to determine whether an undertaking exists as defined by NHPA. The Federal involvement must be such that the Federal agency has enough control over the project to influence its outcome. Courts increasingly focus on whether the Federal agency approval was a prerequisite to the project or merely a nonbinding recommendation, in establishing the applicability of NHPA. There is still a difference among the courts as to how to interpret the definition of an "undertaking" in NHPA and the exact

Kalorama Historical Ass'n v. Christopher, 49 F.3d 750 (D.C. Cir. 1995) (court of appeals affirmed decisions of Director of Office of Foreign Missions and Foreign Missions Board of Zoning Adjustment); City of Grapevine v. Department of Transp., 17 F.3d 1502 (D.C. Cir.) (court of appeals denied petition for review of FAA's approval), *cert. denied*, 115 S. Ct. 635 (1994); Daingerfield Island Protective Soc'y v. Babbitt, 40 F.3d 442 (D.C. Cir. 1994) (court of appeals affirmed decisions of National Park Service and National Capital Planning Commission); Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992) (district court affirmed Corps permitting decision), *aff'd*, 990 F.2d 729 (2d Cir. 1993); New Hanover Township v. United States Army Corps of Eng'rs, 796 F. Supp. 180 (E.D. Pa. 1992) (district court affirmed Corps permitting decision), *vacated*, 992 F.2d 470 (3d Cir. 1993); West Branch Valley Flood Protection Ass'n v. Stone, 820 F. Supp. 1 (D.D.C. 1993) (district court held that Corps had complied with NEPA and NHPA); Indiana Coal Council v. Lujan, 774 F. Supp. 1385 (D.D.C. 1991) (district court found that Office of Surface Mining regulations failed to comply with NHPA), *vacated in part and appeal dismissed*, No. 91-5397 (D.C. Cir. Apr. 26, 1993); Yerger v. Robertson, 981 F.2d 460 (9th Cir. 1992) (court of appeals upheld agency decision not to renew permit); Commonwealth of Kentucky v. United States Army Corps of Eng'rs, No. 89-77 (E.D. Ky. Sept. 21, 1992) (district court held that Corps complied with NEPA and NHPA); Waterford Citizens' Ass'n v. Reilly, 970 F.2d 1287 (4th Cir. 1992) (court of appeals found that EPA had not abused its discretion); Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n, 959 F.2d 508 (4th Cir. 1992) (court of appeals affirmed FERC decision); Communities, Inc. v. Busey, 956 F.2d 619 (6th Cir.) (court of appeals affirmed FAA decision), *cert. denied*, 506 U.S. 953 (1992); Friends of Sierra R.R. v. Interstate Commerce Comm'n, 881 F.2d 663 (9th Cir. 1989) (court of appeals dismissed petition for review of ICC decision), *cert. denied sub nom.* Tuolumne Park & Recreation Dist. v. Interstate Commerce Comm'n, 493 U.S. 1093 (1990); Illinois Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246 (D.C. Cir. 1988) (court of appeals upheld ICC order), *cert. denied*, 488 U.S. 1004 (1989); Connecticut Trust for Historic Preservation v. Interstate Commerce Comm'n, 841 F.2d 479 (2d Cir. 1988) (court of appeals denied petition for review of ICC decision).

[428]Ely v. Velde (Ely II), 497 F.2d 252 (4th Cir. 1974).

[429]Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974).

nature of the license, approval, permit, or assistance to which it refers. Generally, though, the courts' inquiry focuses on the ability of the Federal agency to influence the project.

When courts find that Federal agencies have a duty to comply with NHPA, they have recognized the value of Section 106 of NHPA as a "stop, look, and listen" procedural provision. Courts often compare NHPA to NEPA and apply the same analysis when rendering opinions on compliance with both statutes, although many courts acknowledge that the threshold for triggering NEPA is higher than NHPA. Courts have required adherence to Section 106 and the Advisory Council on Historic Preservation's implementing regulations in varying degrees. Some courts require strict adherence to the procedures, while others look beyond the Federal agency's procedural flaws and examine the efforts made by the agency to mitigate the effects of the project on the historic property, ruling in favor of Federal agencies if they substantially comply with Section 106 and its implementing regulations. Unless agencies have been arbitrary or capricious, abused their discretion, or otherwise failed to act in accordance with the law, courts tend to uphold the agencies' procedural compliance.

As the Council moves to new regulations, the principles of Section 106 that have evolved over 30 years will continue to guide both the administrative process and judicial interpretion of NHPA. Courts will continue to define the "edges" of the application of Section 106, but it remains to be seen whether the tendency to draw the boundaries conservatively will continue in light of any new regulations.

## Part Two

# Summaries of Court Decisions Involving Federal Historic Preservation Law

# 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.

# 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.

# Case 3

***Ely v. Velde (Ely I),* 321 F. Supp. l088 (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.]

# Case 4

***Miltenberger v. Chesakeake & 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.

# 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. HOD 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.

# 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.

# 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.

# 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.

# 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 (FHW A), this particular segment had not. The State had received location approval from FHW A 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.

# Case 10

***River v. Richmond Metropolitan Authority,* 359 F. Supp. 611 (E.D. Va.), *a/I'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 V.S.C. § 1331 to establish Federal court jurisdiction, the court found that it need not consider the fact that plaintiffs 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 fmd 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.

# Case 11

***Saint Joseph l£lStorical 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, fmding that NEPA did not apply in the situation at bar. *Id.* at 609-12. The court denied injunctive relief. *Id.* at 613.

# Case 12

***Ely v. Velde (Ely II),* 497 F.2d 252 (4th Cir. 1974).**

In this second challenge to the construction of a penal institution in the Historic Green Springs area of Virginia (see *Ely* v. *Velde (Ely I),* Case No.3 in this report), residents again sought an injunction against the project, which was to be funded by a block grant from the Law Enforcement Assistance Administration (LEAA), alleging that defendants had failed to comply with the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA). At the time of the fIrst lawsuit, the State defendant had received a Federal grant but had not spent any Federal money on the project. Although the court in *Ely I* had found that defendants must comply with NHPA and NEPA because the State was to receive Federal funds, the court had declined to enjoin the State from construction. Thus, the State was free to relinquish its unexpended grant and begin construction on its own without complying with either NHPA or NEPA.

The State, however, chose to proceed using Federal funds, and State and LEAA officials drafted an environmental impact statement (EIS). When the EIS met with public disapproval, the State decided to request withdrawal of the Federal block grant funds from the project and to divert the funds to other State projects. The State asserted that its transferral of the funds obviated the need to comply with NHPA and NEPA.

The Fourth Circuit reversed the district court's ruling that the transfer was permissible and its dismissal of the complaint, holding that the State's avoidance of NHPA and NEPA while retaining Federal funds that were granted with the understanding that they would be spent in compliance with NHPA and NEPA frustrated Congressional intent to preserve environmental and historic values. Accordingly, the State was not entitled to use Federal block grant money for any purpose unless it complied with both statutes. 497 F.2d at 256.

However, the court went on to find that the penal facility had not become an "irrevocably Federal project" at the time that the State withdrew its request for the grant money since no construction had begun, no Federal money had been spent, and no other Federal project was closely related. Therefore, the court held that the State could construct the facility without Federal aid without complying with NHPA or NEPA, but it could not retain the Federal money for other purposes. *Id.* at 257.

The court remanded the case to the district court for selection of a remedy: the State could proceed with the project if it reimbursed the Federal Government for funds allocated to the facility and then diverted to other projects; could reapply for Federal aid, knowing that LEAA must satisfy the requirements of NHPA and NEPA; or could abandon its plan to use the site as a penal facility, thereby giving residents relief similar to the injunction that they sought. The court concluded that if the State declined to undertake a course of action consistent with the court's opinion, then the district court should permanently enjoin construction of the penal facility. *Id.*

# Case 13

***Environmental Defense Fund v. Tennessee Valley Authority,* 371 F. Supp. 1004 (E.D. Tenn. 1973), *affd per curiam,* 492 F.2d 466 (6th Cir.1974).**

Plaintiffs began this action to enjoin the Tennessee Valley Authority (TV A) 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). TV A 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. TV A 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 TV A had complied with the National Historic Preservation Act. *Id.* at 1015.

# 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.

# 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.

# 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 Wann 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 detem1ined 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.]

# 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.]

# 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.

# 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 V.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 V. 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 *1060fNHPA.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.

# 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.]

# 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.

# 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 .l 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.

# 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.

# 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).

# 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.

# 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.]

# 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*.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.*

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.*

# 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.

# Case 55

***Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980).**

This suit involved an area in Virginia known as the Historic Green Springs District. Although the historic district was first listed in the National Register of Historic Places in 1973, the State's nomination of the district to the Register was defective. When this was discovered in 1978, the historic district was removed from the Register. Soon after, the Secretary of the Interior unilaterally designated the district as a National Historic Landmark, which automatically placed the district back on the Register, and accepted certain preservation easements in the district under the authority of the Historic Sites Act of 1935.

After a local preservation organization filed suit to prevent the Farmers Home Administration from guaranteeing a loan to finance mining operations in the historic district, the mining company challenged the Secretary's decisions. The court dismissed the preservation organization's claims and conducted a trial on the mining company's allegations. The company asserted that the Secretary did not have the authority to take the action he took, that the restrictions thus placed on the land amounted to a taking, and that the administrative procedures used by the Secretary violated standards of due process and the Administrative Procedure Act.

First, the court addressed the scope of the Secretary's authority to designate the district a National Historic Landmark and to accept preservation easements. The Historic Sites Act authorizes the Secretary to acquire historic properties and recognize as landmarks properties of national significance. The enactment of the National Historic Preservation Act (NHPA) in 1966 extended recognition of historic places to sites of local and State importance and otherwise expanded the Secretary's authority, but it did not authorize the Secretary to acquire properties. Although the court found that the Secretary regarded the district as having national importance and did not misapply a State or local standard to the district, it found that the Secretary applied values recognized only in NHPA to his action under the Historic Sites Act, thereby impermissibly broadening the Historic Sites Act. Because of these misapplications and the paucity of the Secretary's statement of reasons for his actions, the court reversed the Secretary's decisions and remanded to the agency, declining to decide the scope of the Secretary's authority. 497 F. Supp. at 847.

Second, the court found no support for the mining company's allegations that designation of the district as a historic district impaired State functions in violation of the Tenth Amendment of the United States Constitution. The scheme implemented under the Historic Sites Act had not imposed a financial burden on the State, wrested control of land use or the economy from the State, or interfered with the State's zoning laws. *Id.* at 848.

Third, the court held that designation of the district as a historic landmark did not amount to a taking for public use without just compensation in violation of the Fifth Amendment of the

United States Constitution. Although designation may restrict the future use of property, it does not have such magnitude or impose economic injuries so severe as to violate the Fifth Amendment. *Id.* at 848-50.

Nevertheless, the court found that the Secretary's actions, although not tantamount to a taking, did place sufficient restrictions on the mining company's property interests as to require satisfaction of procedural due process. *Id.* at 852. Although the Secretary had provided for notice and public hearing during his decisionmaking process and had relied on informal criteria contained in two publications, he had never formulated formal procedures or criteria for the landmark program and had conducted his decisionmaking in a haphazard manner after opportunity for reasonable public response had passed. The court held that without published rules of procedure and substantive criteria for qualification of properties as landmarks, the mining company was denied a meaningful opportunity to respond to the proposed actions and the court was precluded from meaningful review. *Id.* at 854-56. Because of these flaws, the court held the landmark designation to be invalid. *Id.* at 856.

Although the company's due process rights were not affected by the Secretary's acceptance of the preservation easements, the court invalidated their acceptance because the Secretary's powers of acquisition are contingent on a property's landmark status, which in this case was faulty. *Id.* at 857.

# 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.

# 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.

# 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.*

# 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.

# 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.

# Case 61

***Wisconsin Heritages, Inc. v. Harris*, 460 F. Supp. 1120 (E.D. Wis. 1978), *dismissed*, 490 F. Supp. 1334 (E.D. Wis. 1980).**

Plaintiff, a preservation organization, sought to enjoin a local redevelopment agency from demolishing the Elizabeth Plankinton mansion in Milwaukee, Wisconsin, as part of an urban renewal project financed in part by a loan and capital grant from the Department of Housing and Urban Development (HUD). HUD and the local agency entered into the loan and capital grant contract in 1965 and revised it on several occasions between 1966 and 1974. In 1975, the Secretary of the Interior determined that the mansion was eligible for inclusion in the National Register of Historic Places and listed the mansion in the Register in 1976. Between the time that the mansion was determined eligible and the time that it was actually listed in the Register, HUD and the local redevelopment agency made a conditional closeout of accounts for the grant. Under the closeout, some money remained available to cover the costs of demolition. Plaintiff challenged HUD's failure to comply with the terms of Executive Order No. 11593, the National Historic Preservation Act (NHPA), and the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA.

In considering the requested preliminary injunction, the court found that NHPA did not apply because the loan and capital grant contract had been signed and the expenditure of funds approved before the mansion was determined eligible or listed in the Register. 460 F. Supp. at 1123-24. Likewise, the Council's regulations and Executive Order No. 11593 did not apply because at the time that HUD made its "decision," as defined in the Council's regulations at 36 C.F.R. § 800.2(g), the mansion had not been determined eligible for or listed in the Register. HUD's "decision" occurred in 1965 when HUD executed the contract and in so doing passed the point beyond which it could no longer require alterations in the plan to modify its impact on the mansion. *Id.* at 1124.

Although the court declined to issue an injunction on historic preservation grounds, it did enjoin demolition until HUD could prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) on the project's effect on the mansion. *Id.* at 1127. Despite the fact that much of HUD's involvement in the project had ended, its retention of control over the remaining funds for demolition was sufficient to impose further NEPA duties. *Id.* at 1126.

After HUD had prepared the EIS, plaintiff returned to the court seeking permanent injunctive relief. In its second opinion, the court first denied plaintiff's motion to file a supplementary complaint, which alleged that HUD had failed to consider rehabilitation of the mansion in the EIS. The court held that plaintiff had waited too long and had not made its comments known to HUD during the commenting process as envisioned by NEPA. 490 F. Supp. at 1338.

Second, the court upheld the EIS, stating that it adequately discussed the adverse impact on the mansion and historic interests. The court found that the alternative of onsite adaptive use of the mansion discussed in the EIS must be judged in light of the information available to the agency at the time it prepared the EIS. Because this alternative was "totally speculative" at that time, HUD's discussion was sufficient. *Id.* at 1340.

Finally, the court reiterated its position that NHPA did not apply, referring to the reasons stated in its earlier opinion. The court did state, however, that even if NHPA did apply, the EIS demonstrated that HUD had taken historic properties into account. The Council had an opportunity to comment when it received and commented on HUD's draft EIS. Thus, the statutory mandates of NHPA were followed. *Id.* at 1341-42.

The court dismissed the lawsuit.

# 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.

# Case 63

***Black Hills Alliance v. Regional Forester*, 526 F. Supp. 257 (D.S.D. 1981).**

A mining company had submitted to the United States Forest Service a construction plan for a mining permit on Federal land in the southern Black Hills. After plaintiffs had filed their complaint, alleging among other things that the Forest Service had failed to comply with historic preservation laws with regard to archeological sites affected by the plan, the company withdrew its plan. The court dismissed the case as moot. Plaintiffs sought costs under Rule 54(d) of the Federal Rules of Civil Procedure.

The court held that the decision whether to award costs under Rule 54(d) is within the discretion of the court, which should weigh seven factors in making its decision, among them whether the prosecution of the case benefited the public or the defendants and whether denial of costs would unduly inhibit future challenges to environmental decisions. 526 F. Supp. at 258. The court first found that prosecution of the action benefited the public because the existence of the action drew attention to the archeological sites, which were nominated to the National Register of Historic Places during the pendency of the suit. *Id.* at 259.

Second, the court held that the lawsuit was of indirect benefit to the defendants because it apprised them that the preservation of archeological sites should be more carefully considered in future preparation and approval of mining plans. *Id.*

Finally, the court found that denial of costs would unduly inhibit future challenges to environmental decisions. *Id.* at 259-60.

The court awarded costs against the company but not against the Forest Service, since the agency had no control over the withdrawal of the plan. *Id.* at 260.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.]

# 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.

# 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.*

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.*

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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).

# Case 93

***National Trust for Historic Preservation v. Dole*, No. 85-2749 (D.D.C. Oct. 3, 1985), *aff'd*, 828 F.2d 776 (D.C. Cir. 1987).**

Plaintiffs alleged that the Federal Highway Administration (FHWA) approved and funded a project to construct suicide prevention barriers on the Duke Ellington Bridge in Washington, D.C., without complying with the National Environmental Policy Act (NEPA), Section 4(f) of the Department of Transportation Act, and the National Historic Preservation Act (NHPA). Plaintiffs sought injunctive relief to prevent construction of the barriers until FHWA complied with the statutes and also sought a declaratory judgment mandating compliance with the statutes prior to construction of similar barriers on the nearby William Howard Taft Bridge.

Under NEPA, plaintiffs challenged FHWA's determination that the Ellington Bridge project fell within a categorical exclusion in FHWA's regulations. The district court, however, held that FHWA's decision to classify the project within the categorical exclusion was neither arbitrary nor capricious. With regard to the Section 4(f) claim, the court also ruled in favor of FHWA after applying the arbitrary and capricious standard of review of the Administrative Procedure Act. The court agreed with FHWA's determination that erection of the suicide barriers did not constitute a "use" as defined by the statute because the barriers would not harm the bridge. Discussing the relationship between NEPA and Section 4(f), the court observed that a finding that an action does not "significantly affect the quality of the human environment" under NEPA "suggests that the project also is not a 'use' under § 4(f)." Slip op. at 8.

The relationship between NHPA, and NEPA and Section 4(f), however, is different, according to the district court. Slip op. at 12. The court observed that a project that triggers Section 106 does not necessarily trigger NEPA and Section 4(f), reasoning that the barriers may have an adverse effect on the historic bridge without constituting a "significant effect" on the human environment or a "use." *Id*. The court found that FHWA properly complied with NHPA by consulting with the State Historic Preservation Officer and the Council and entering into a Memorandum of Agreement (MOA). The court observed that under the Council's regulations, execution of an MOA constitutes the comments of the Council and evidences satisfaction of the Federal agency's Section 106 responsibilities. Slip op. at 11. Thus, the court denied plaintiffs' request for injunctive relief to prevent the Duke Ellington Bridge project.

With regard to the Taft Bridge project, the court denied declaratory judgment relief because the matter was not yet ripe for review; FHWA was preparing an Environmental Assessment and a Section 4(f) evaluation and had expressed its intention to initiate consultation pursuant to Section 106 of NHPA.

On appeal, the district court affirmed the district court's ruling on NEPA and Section 4(f), finding that the barriers did not serve a transportation purpose in the first place, but did not address the NHPA issue because plaintiffs had not raised it on appeal. 828 F.2d at 777 n. 2.

# 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.

# 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.

# Case 96

## *Connecticut Trust for Historic Preservation v. Interstate Commerce Commission*, 841 F.2d 479 (2d Cir. 1988).

The Connecticut Trust for Historic Preservation, a statewide preservation organization, and other environmental groups filed a petition for review of the Interstate Commerce Commission's (ICC) decision granting permission to the Boston & Maine Corporation to abandon a portion of the Farmington Canal Branch Rail Line. The complaint alleged that ICC violated the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and the National Trails Systems Act, in addition to related regulations. The Advisory Council on Historic Preservation took the position that ICC had foreclosed its opportunity to comment on the abandonment as a whole, although ICC had not foreclosed comments on any known historic properties the abandonment would affect.

Without considering the comments and requests for imposition of a public use condition made by the State of Connecticut's departments of environmental protection and transportation, the Sierra Club, the local government, and the Connecticut Trust, ICC issued an order allowing the abandonment of the railroad. ICC later reopened the case, considered the environmental and historical effects and, once again, allowed the abandonment.

As a preliminary matter, the court determined it would consider as final the decision ICC issued upon reopening the case, rather than regard the initial order as the final decision. 841 F.2d at 482. The court found that once the case had been reopened, the comments in question received thorough consideration by ICC, as did comments submitted by the Connecticut State Historic Preservation Officer (SHPO), local governments, and citizens. In finding that ICC had, indeed, made an informed decision, the court noted that both NHPA and NEPA stipulate only that agencies acquire information before acting. *Id.* at 484. In this instance, an environmental assessment rather than an environmental impact statement was appropriate. *Id.* at 483.

Further, the court of appeals rejected the allegation that ICC had foreclosed the Council's opportunity to comment, since ICC had formally solicited the Council's comments well in advance of making its final decision. The court also rejected petitioners' argument that it was deprived of an opportunity to purchase the entire line, finding that defects in ICC procedures did not prevent the Connecticut Trust from purchasing the line, particularly in light of the Trust's failure to make an offer.

With respect to the claim under the National Trails System Act, the court found that that law does not empower ICC to order trail use. Similarly, the court determined that the Railroad Revitalization and Regulatory Reform Act of 1976 did not mandate imposition of public use conditions. Even if it did, private parties such as the petitioners were not the intended beneficiaries of such conditions. In any event, the court noted approvingly that the city of New

Haven was negotiating with the railroad company to purchase large portions of the line and that a public use condition had in fact been imposed. Thus, the court of appeals denied the petition for review.

# Case 97

***Washington Trust for Historic Preservation v. City of Seattle*, No. C87-1506C (W.D. Wash. Feb. 25, 1988).**

The Washington Trust for Historic Preservation, with the National Trust for Historic Preservation as an intervening plaintiff, sought to enjoin the city of Seattle from violating the terms of a 1980 Memorandum of Agreement (MOA) among the city, the Advisory Council on Historic Preservation, the Department of the Interior, and the Washington State Historic Preservation Officer (SHPO). The MOA was executed prior to the Interior Department's transfer to the city of 127 acres of land and 12 buildings in the National Register-listed Fort Lawton Historic District. It required the city to consult with the SHPO at various phases of the project and to obtain its comments prior to any final decision on demolition. The MOA also required the city to "take any action required to prevent further deterioration" of the historic buildings, enact an ordinance to manage the historic district, and record any buildings to be demolished. according to the standards of the Historic American Buildings Survey.

The district court found that the plaintiff preservation organization had standing to sue under the National Historic Preservation Act (NHPA) on behalf of its interests and those of its members as evidenced by NHPA's attorneys' fees provision. The court also recognized that the National Trust had standing to bring suit to enforce both the MOA and the statute.

Assessing the facts of the case, the district court found that the city potentially violated the MOA by failing to properly consult with the SHPO, much less obtain its comments, prior to making a final decision to demolish all but two of the historic buildings. The district court also noted that the city failed to adopt the ordinance to provide for management of the historic district, even though 10 years had elapsed since the signing of the MOA, and that proper recordation of the buildings had not yet occurred.

In ruling on the preliminary injunction, the district court determined that plaintiffs had demonstrated a likelihood of success on the merits as they showed that defendants failed to adhere to several provisions of the MOA. The court found that irreparable harm would occur if demolition of the historic buildings proceeded and the MOA remained unfulfilled. Further, the court found that the injury to plaintiffs outweighed the hardship to defendants because plaintiffs could not be adequately compensated in damages if the demolition went forward.

The court enjoined the city from demolishing the historic buildings until the requirements of the MOA were fulfilled.

# 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.*

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# Case 113

***McMillan Park Committee v. National Capital Planning Commission*, 759 F. Supp. 908 (D.D.C. 1991), *rev'd*`, 968 F.2d 1283 (D.C. Cir. 1992).**

A nonprofit organization and the National Trust for Historic Preservation sued the National Capital Planning Commission (NCPC), a Federal agency, and the District of Columbia. Both NCPC and the District government are responsible for developing a comprehensive plan to preserve the natural and historical landscape of the Nation's capital. The District government may propose to amend the plan through action by the Mayor and the City Council. The amendment must then be reviewed by NCPC with regard to its potential impact on Federal interests in the Nation's capital. NCPC retains the power to veto any amendment to the comprehensive plan that it finds will result in a negative impact on Federal interests.

In 1983, the comprehensive plan identified McMillan Park, site of a circa 1900 water filtration system, as a site whose essential open space character should be protected from unnecessary development. In 1986, the Army Corps of Engineers, owners of the park, declared it surplus and asked the General Services Administration (GSA) to dispose of it. GSA searched for prospective buyers, insisting on selling the property for mixed commercial development. The District government expressed an interest in buying the property for mixed commercial-public use.

The Advisory Council on Historic Preservation expressed concerns about the transfer and notified GSA of its Section 106 responsibilities. GSA responded by including eight restrictive covenants in the deed of sale to the District of Columbia. The covenants required the District government to submit all development plans for approval by the District's Historic Preservation Officer. The District government purchased the property for $9.3 million; however, it could not develop it until the comprehensive plan promulgated by NCPC was amended to permit commercial development. Following standard procedures, the District government enacted the amendment and submitted it to NCPC. Without going through the Section 106 process, NCPC certified that the amendment would not have a negative effect on Federal interests.

Plaintiffs alleged that NCPC did not abide by the requirements of Section 106 of the National Historic Preservation Act (NHPA) when it approved the District's proposed amendment to the comprehensive plan. Defendants alleged that they were not required to comply with Section 106, since approval of the amendment was not an undertaking.

The district court found that NCPC's review of the amendment was, indeed, an undertaking because NCPC had the authority to approve or to veto it. According to the district court, Congress intended agencies to go through the Section 106 process to facilitate informed decisions about whether an agency action would adversely affect the historic property. The district court also found that "authorization" to veto an amendment is enough to constitute a

Federal undertaking and, therefore, requires Section 106 review. 759 F. Supp. at 915. Because NCPC retained the power to approve or disapprove the proposed amendment, the district court determined its review was an undertaking.

The court of appeals reversed the district court on other grounds, determining that NCPC's review of the amendment did not constitute a new undertaking because of GSA's previous Section 106 review. This decision centered on the Council's definition of an undertaking in 36 C.F.R. § 800.2(o). The court focused on the particular part of the definition that states an undertaking includes "new and continuing projects, activities, or programs and *any of their elements not previously considered under section 106.*" 968 F.2d at 1285, 1288, (citing 36 C.F.R. § 800.2(o) (emphasis added)). In interpreting this aspect of the definition, the court determined that a project is not an undertaking if all of its elements have been previously considered under Section 106. *Id.* at 1287. The court reasoned that if a project had already satisfied the Section 106 process and presented no new, unconsidered elements, nothing would be gained by further review. *Id.* at 1288.

The appellate court explained that the Council had considered all the elements presented by the amendment at the time of the park's purchase by the District government. When the property was made available, GSA specified in writing that among the possible uses of the property were commercial and residential development. The court noted too that the District government had made clear in writing its intention to commercially develop the property.

Most importantly, the court found that the protective covenants suggested by the Council at the time of the sale indicated Council satisfaction that a change in the park's use designation could be achieved consistent with NHPA. *Id*. The amendment to the comprehensive plan did no more than codify the change in the park's use designation in the manner previously contemplated by the Council. The Council, however, took the position that there were new elements to the project it had not reviewed.

In reaching its decision, the court of appeals noted that an agency's compliance with Section 106 for a given project does not necessarily satisfy all future obligations it or other Federal agencies may have to fulfill under NHPA for the same project. *Id*. at 1289. Only where, as in this case, a project has been found by the Council to comply with Section 106, and the same project comes before a second Federal agency with no new unreviewed elements, can a finding be made that further Section 106 review is not required.

# 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*.

# 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.

# 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.

# 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)).

# 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.

# 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.

# 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.

# Case 121

***New Hanover Township v. United States Army Corps of Engineers*, 796 F. Supp. 180 (E.D. Pa. 1992), *vacated*, 992 F.2d 470 (3d Cir. 1993).**

A Pennsylvania township, a citizens' group, and a private individual sued the Army Corps of Engineers alleging that the Corps erroneously determined a company's actions qualified for a nationwide permit under the Clean Water Act. The company sought to use land within the township as a municipal waste landfill. Less than one acre of wetlands would be filled as part of the construction project. The Corps determined that the company could engage in construction under a nationwide permit, but informed it of the need to obtain a water quality certificate from the State before work began.

After determining that the case was ripe for review, the district court found the Corps had properly delineated jurisdictional wetlands, estimated on-site and off-site impacts, and determined that the historic significance of a neighboring property need not be considered at that particular stage of the permitting process. According to the court, the Corps had applied appropriate criteria in delineating the wetlands, relying more heavily on the soil study than the site's hydrology. The court found nothing inappropriate with the Corps' reliance on soil samples submitted by the permittee, since the Corps also used information provided by the local Soil Conservation Service and the State environmental resources department. Neither did the court find the Corps obligated to question the permittee's estimation of the amount of wetlands that must be filled in constructing the landfill. The applicant bore the risk of erroneously describing affected wetlands, the court explained. 796 F. Supp. at 185. The court also found nothing in the record to suggest that filling less than one acre of wetlands would have an adverse effect on wetlands located off the landfill site. The Corps was thus not obligated to investigate off-site effects.

As a final matter, the district court addressed plaintiffs' claim that the Corps had erred in not requiring the permittee to determine the project's effect on adjacent historic properties. The Corps took the position that, although it was aware of the potential existence of historic properties, it was not obligated to determine the project's impact on adjacent property at that time. According to the Corps, adverse effects should be considered if and when the applicant decided to construct a pipeline. Plaintiffs argued that, because the pipeline would almost certainly be built on the adjacent site, the Corps was improperly segmenting the permit process. The court disagreed, again noting that the applicant bore the risk of beginning construction without knowing if that pipeline could, indeed, be built. The Corps had also represented that it would later require the applicant to conduct a study of the effect of the pipeline on the historic property when the applicant got approval from the State, even if the final location of the pipeline was not determined. *Id.* at 187.

Plaintiffs appealed the district court decision, but the court of appeals found that the case was not ripe for review. The Corps' decision on the nationwide permit was not the final step leading to construction of the landfill; the applicant still needed to obtain State approval. The project would not proceed if the State did not issue the requisite water quality permit. The appellate court did note that several factors, such as the Corps' decision being the final position on the wetlands issue, suggested the case might be ripe because review of the Corps' decision would be a purely legal question. However, because the applicant still needed further approval from the State, the court decided the case was not yet ripe for review. Further, the court found that there would be no hardship to the parties if the court refused to hear the case because the State still may not issue the permit to the applicant. Harm was neither certain nor impending. 992 F.2d at 473. The court vacated the district court decision and remanded the case with instructions to dismiss it as unripe.

# 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.

# 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.

# 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.*

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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.

# 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 con-sultative 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.

# 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.

# 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. 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 turns on whether NHPA and the Archeological Resources Protection Act are applicable. The court found that they were applicable and that plaintiff had not exhausted all

administrative remedies available to him. The court concluded that Section 106 compliance procedures applied to plaintiff for two reasons: 1) NPS is required to manage and maintain property it owns to preserve historic, archeological, architectural, and cultural values in compliance with Section 106 under Section 110(a) of NHPA, and 2) NPS is required by Section 106 itself to take into account the effect plaintiff's undertaking will have on a site listed on the National Register, on which the property in question is located.

In reaching this conclusion, the court found that this was an undertaking for purposes of Section 106, and construed the 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 Federal Government. Thus, plaintiff must exhaust all administrative remedies before seeking relief from the court.

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.

# 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.

# 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. 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.

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.

# 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. pt. 325, app. C2(c). The court concluded that plaintiffs had failed to articulate any recognizable error on this issue.

# 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 because 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 such a decision had been supported by the city's representatives.

# 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.

# 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, but that the greater weight of authority held for the existence of such a right of action under Section 305.

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."

# 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.

# 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.

# 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.

# 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 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, not HUD, was responsible for compliance with the relevant statutes and regulations as well as responding to objections from the public, while HUD retained final authority for ensuring that the grant applicant adhered to the proper statutory and regulatory procedures.

After a thorough review, the court concluded that both the city and HUD complied with the applicable statutes and regulations. The court also stated that plaintiff's claims of bad faith and procedural irregularities did not have merit, and noted that redress for decisions made by elected officials lies in the political process at the ballot box, not with the Federal court.

# 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 Reading, Pennsylvania, 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.

# 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. Epsy,* 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.

# 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.

# 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 the argument was considered by all parties involved. 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.

# 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. Failure to do so made that 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.

# 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.

# 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.

# 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.

# Case 155

***Muckleshoot Indian Tribe v. United States Forest Service,* 177 F.3d 800 (9th Cir. 1999).**

Plaintiffs-apellants 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.

# 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.

# 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 nor 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.*

# 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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Pennsylvania Avenue Development Corporation Act of 1972, 40 U.S.C. §§ 871-885 (1994)

Public Buildings Cooperative Use Act of 1976, Pub. L. No. 94-541, 90 Stat. 2505 (1976) (codified at 40 U.S.C. §§ 490, 601a, 606, 611, 612a (1994))

Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601-45 (1994)

Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. §§ 801-38 (1994)

Refugee Education Assistance Act, 8 U.S.C. § 1522 note (1994)

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994)

Rivers and Harbors Act, 33 U.S.C. §§ 401, 403 (1994)

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) (codified in scattered sections of 49 U.S.C.)

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1994)

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4602, 4604-4655 (1994)

### Executive Orders

Exec. Order No. 11,593, 3 C.F.R. 154 (1971), *reprinted in* 16 U.S.C. § 470, note (1982)

### Regulations

Advisory Council on Historic Preservation, "Protection of Historic and Cultural Properties," 36 C.F.R. pt. 800 (1995)

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* All reference numbers refer to the case numbers of summarized court decisions. Cases 136-158 are found in Federal Historic Preservation Case Law Update 1996-2000.

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# About the Council

The Advisory Council on Historic Preservation is an independent Federal agency that promotes the preservation, enhancement, and productive use of our Nation's historic resources, and advises the President and Congress on national historic preservation policy.

The mission of the Advisory Council on Historic Preservation is to promote the preservation, enhancement, and productive use of our Nation's historic resources, and advise the President and Congress on national historic preservation policy.

Headquarters of the Council are located in Washington, D.C.