



Preserving America's Heritage

National Historic Preservation Act Authorization for Federal Agency Assistance to State Historic Preservation Officers

Federal agencies have sought the opinion of the Advisory Council on Historic Preservation (ACHP) regarding whether federal law authorizes them to use appropriated funds to assist State Historic Preservation Officers (SHPOs) in connection with reviews under Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f. The ACHP believes that this expenditure of federal funds to SHPOs is authorized by Section 110(g) of the National Historic Preservation Act (NHPA).

Section 110(g) of the NHPA states that:

Each Federal agency may include the costs of preservation activities of such agency under [the NHPA] as eligible project costs in all undertakings of such agency or assisted by such agency. The eligible project costs may also include amounts paid by a Federal agency to any State to be used in carrying out such preservation responsibilities of the Federal agency under [the NHPA], and reasonable costs may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit.

16 U.S.C. § 470h-2(g) (emphasis added).

Under the NHPA, a key preservation responsibility of a federal agency is compliance with the requirements of Section 106 prior to making a final decision on an undertaking. Section 106 requires a federal agency to:

... 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 [of Historic Places]... [and] ... afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f. Compliance with Section 106 is the legal responsibility of the federal agency. While the regulations implementing Section 106, 36 C.F.R. part 800, require the federal agency to consult with various parties, including the relevant SHPO, the ultimate responsibility for compliance remains with the federal agency.

Although the SHPOs are involved in the Section 106 process, Section 106 remains exclusively a “preservation responsibilit[y] of the Federal agency” covered by the authorizing language of Section 110(g). The SHPO role is one of assisting the federal agency in Section 106, and not one of assuming “responsibility” for it, making decisions for federal agencies, or replacing independent federal agency judgment. Section 101(b) of the NHPA makes the assistance role of the SHPO clear in providing that, with relation to Section 106, the SHPO will:

(E) advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities; ... [and] ...

(I) consult with appropriate Federal agencies in accordance with [the NHPA] on-

(i) Federal undertakings that may affect historic properties; and

(ii) the content and sufficiency of any plans developed to protect, manage, or reduce or mitigate harm to such properties;...

16 U.S.C. § 470a(b)(3) (emphasis added).

The role of the SHPO is to “advise,” “assist,” and “consult” with the federal agency to help the federal agency meet its Section 106 responsibilities. Funding SHPO work under Section 106 could help a federal agency carry out its “preservation responsibilities” and is therefore a use of appropriated funds authorized by Section 110(g) of the NHPA.

Federal assistance of SHPOs was explicitly built into the federal historic preservation program by Congress. Not only did the NHPA include the clear language of Section 110(g) regarding use of appropriated funds for states in Section 106 reviews, but it also established a system whereby the National Park Service (NPS) approves and evaluates the SHPO programs and issues grants to them to, among other things, support their role in Section 106 reviews. 16 U.S.C. § 470a(b), (d)(2), and (e). The amount appropriated for such grants to SHPOs for fiscal year 2010 was \$54.5 million. Of course, the NPS is one of the federal agencies whose undertakings are subject to Section 106 review with the cited participation by SHPOs. Congress understood that the money was not a way to inappropriately influence SHPOs’ opinions, but rather a partial payment for the services provided by those entities in helping federal agencies meet their federal responsibilities including those under Section 106. This federal oversight and matching grants system has been in place since the late 1960s, without raising concerns that SHPOs are somehow compromised by it in their Section 106 role.

In conclusion, compliance with Section 106 is one of the “preservation responsibilities of the Federal agency under the [NHPA]” identified in Section 110(g). Federal funding that allows the SHPO to assist the federal agency in meeting its Section 106 responsibilities would by definition be “used in carrying out such preservation responsibilities of the Federal agency under [the NHPA],” and therefore be authorized under Section 110(g) of the NHPA. This authorization is available to all federal agencies, regardless of whether they have separate, agency-specific authorizations for such expenditures.