
THE
NATIONAL HISTORIC PRESERVATION ACT
OF 1966:

An Assessment of Its Implementation
Over Twenty Years

Advisory Council on Historic Preservation
September 1986

Advisory Council On Historic Preservation

The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809
Washington, DC 20004

September 23, 1986

Dear Mr. President:

The Advisory Council on Historic Preservation is an independent Federal agency charged with advising the President and the Congress on historic preservation matters. The Council is composed of four expert members, four members from the general public, the heads of six Federal agencies, the Architect of the Capitol, a governor, a mayor, the Chairman of the National Trust for Historic Preservation, and the President of the National Conference of State Historic Preservation Officers.

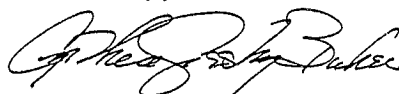
This year marks the 20th anniversary of the National Historic Preservation Act of 1966, which created the Council and established a national historic preservation program carried out in partnership by the Federal Government, the States, local governments, the private sector, and the National Trust for Historic Preservation.

In recognition of this anniversary, the Council last year empaneled a task force to study how the Act has been implemented, to recognize its strong points, identify its needs, and recommend actions to improve the overall program. This task force was chaired by Mimi Rodden of Nevada and composed of members representing the full range of interests of the Council. At the Council's July 21-22, 1986, meeting, the task force presented its report, which I have the honor to enclose on behalf of the Council for your information and use.

This report was prepared under the direction of the task force and was reviewed by the Council membership. By unanimous vote, the members directed that this Assessment be submitted to officials of the Administration and Congress. The Assessment represents the views of committed historic preservationists but does not necessarily represent the views or recommendations of Federal agencies or other organizations that sit on the Council. We believe the Assessment is a valuable contribution to the continuing dialogue that brings vitality and progress to the national historic preservation program.

The National Historic Preservation Act is the cornerstone of the national program to preserve our cultural heritage. In its 20-year history, it has been continually refined and improved to meet the changing needs of historic preservation in America. I hope that you will use this Assessment as you address issues concerning the program and its continuing development. Likewise, I hope that you will join us in our appreciation for the achievements that have been attained by the partners in the national historic preservation program over the last 20 years.

Sincerely,



Cynthia Grassby Baker
Chairman

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**The Advisory Council on Historic Preservation,
an independent Federal agency,
serves as a primary policy advisor
to the President and Congress
on historic preservation issues.**

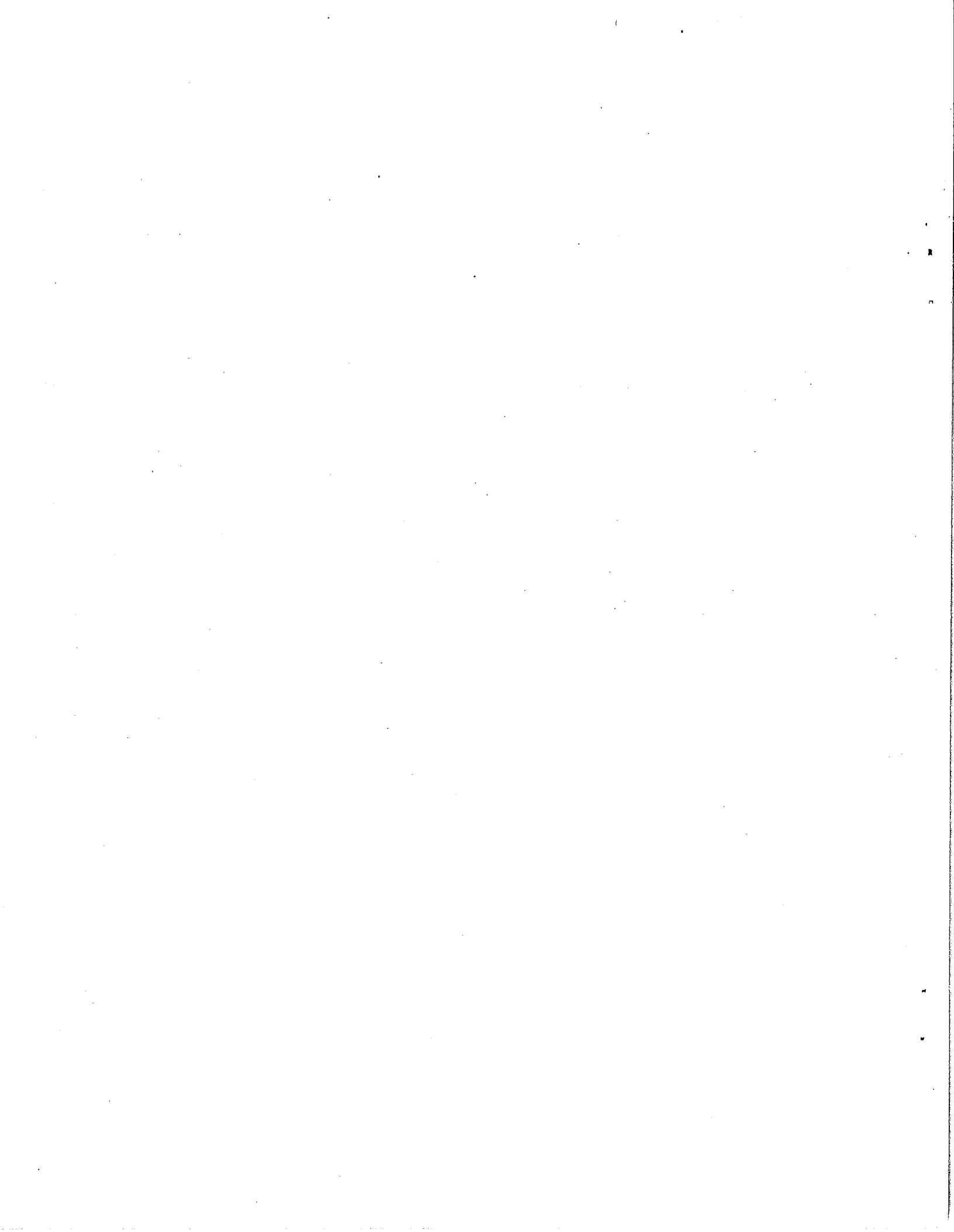


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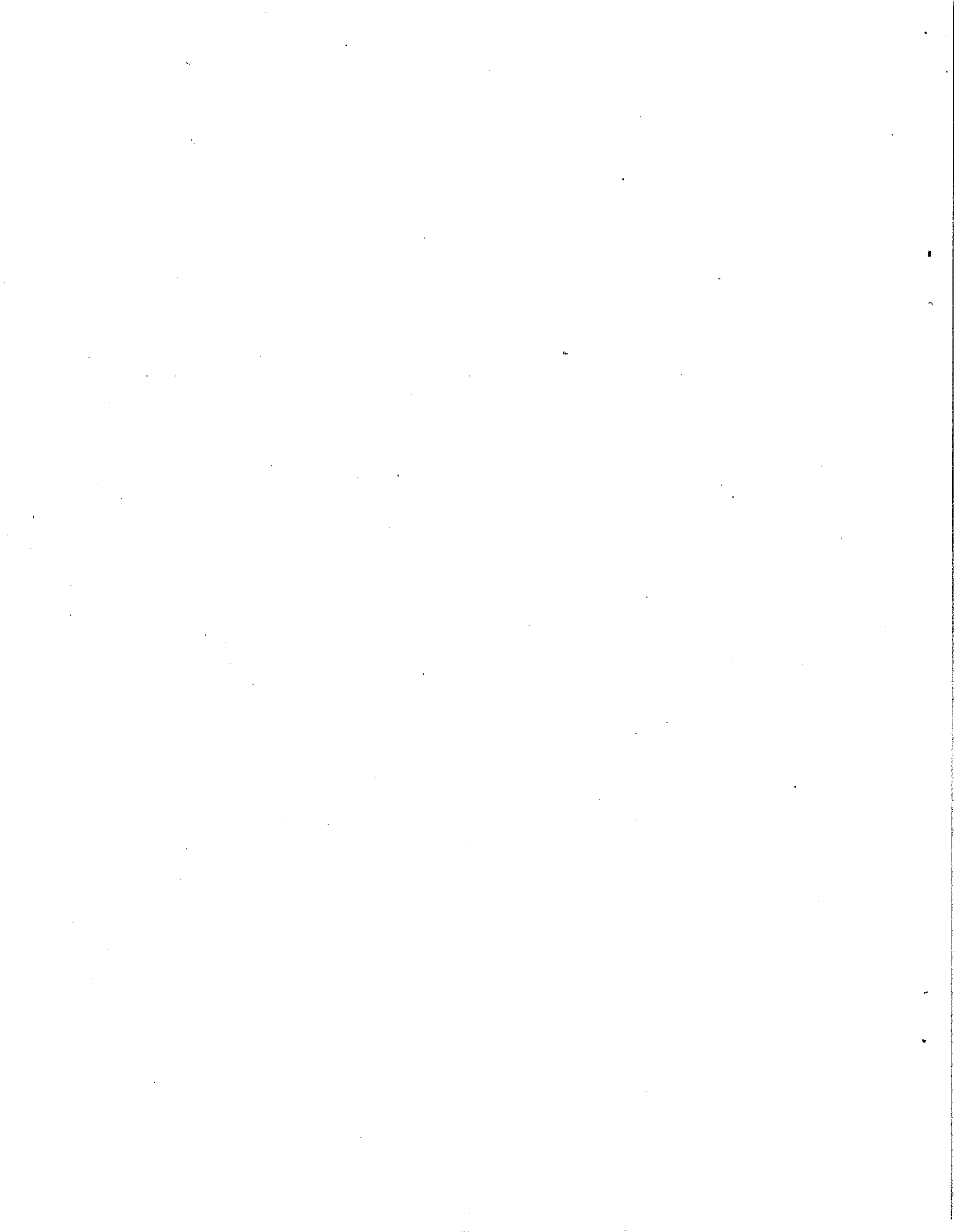
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LIST OF ACRONYMS

BIA -- Bureau of Indian Affairs

CDBG -- Community Development Block Grant

CLG -- Certified Local Government

the Council -- Advisory Council on Historic Preservation

FY -- fiscal year

HPTC -- historic preservation tax credit

HUD -- U.S. Department of Housing and Community Development

Interior -- U.S. Department of the Interior

National Register -- National Register of Historic Places

NHPA, the act -- National Historic Preservation Act

NPS -- National Park Service

SHPO -- State Historic Preservation Officer

the Trust -- National Trust for Historic Preservation

UDAG -- Urban Development Block Grant

UNESCO -- United Nations Educational, Scientific, and Cultural Organization

INTRODUCTION

The Purpose of This Assessment

The National Historic Preservation Act of 1966, this Nation's central historic preservation legislation, is 20 years old this year. In this anniversary year, preservationists across the country are celebrating the accomplishments that have taken place since the National Historic Preservation Act became law. This Assessment has been prepared as part of that celebration. The Assessment, however, is less retrospective than prospective. Recognizing and appreciating the strengths of the national program that has grown up around the National Historic Preservation Act, we ask: "How can this program be improved?"

This Assessment is designed for use by decisionmakers in the Administration and the Congress in considering budget options for historic preservation during fiscal year 1988 and thereafter, and in considering whether further legislation or administrative actions are needed to advance or clarify the act's purposes. It also identifies possible actions by the Council to aid in implementing the act.

Over the years, questions have arisen about how best to carry out the national policies set forth in the National Historic Preservation Act, about how well the particular mechanisms created in response to the act address these purposes, and about possible alternatives to these mechanisms. The act has been amended several times, most recently in 1980, in response to such questions. In this Assessment, we will outline questions related to 11 broad topics that are being actively discussed among participants in the national historic preservation program today. In some cases, we will offer definite recommendations as to how these questions might be addressed by executive or legislative actions; in other cases, we have been unable to reach consensus on an approach, and instead discuss multiple options.

The National Historic Preservation Act

Following World War II, the United States embarked on an ambitious program of economic development. Construction began on the interstate highway system and on dams and reservoirs in the Nation's river valleys. The urban renewal program was begun, designed to transform and revitalize our cities by clearing the land in decaying urban centers and attracting new development.

By the mid-1960's, it had become apparent that, for all their benefits, these development programs had important social, cultural, and esthetic costs. Historic buildings and neighborhoods, treasured by the communities in which they stood and definitive of their heritage and character, were being lost in order to make way for urban renewal that often never occurred. Superhighways replaced valued historic landscapes, segmented historic neighborhoods, demolished landmark buildings, and erased archeological sites. Reservoirs flooded the archeological remains of whole prehistoric cultures.

In 1966, the Congress took action to ensure that these costs were considered as economic growth continued. In enacting the National Historic

Preservation Act of 1966,¹ Congress directed that historic properties of importance to the Nation, to the States, and to local communities be identified and registered, and that Federal agencies consider these properties when planning actions that might affect them for the purpose of protecting them if possible. The act created an Advisory Council on Historic Preservation to advise the President and Congress on historic preservation matters and to review Federal actions affecting historic places. It also authorized the provision of grants-in-aid to the States and to the National Trust for Historic Preservation to assist them in carrying out historic preservation work.

The 20 years that have gone by since the National Historic Preservation Act was put in place have seen dramatic changes in the Nation's approach to its heritage. Due to the programs authorized by the act, and especially to favorable tax policies put in place since 1980, rehabilitation and reuse of historic buildings are now central to many urban redevelopment strategies. Under the authority of the act, every State and territory has a State Historic Preservation Officer responsible for coordinating and encouraging historic preservation work. As directed by the act, Federal agencies regularly identify historic properties that may be affected by their projects and take actions to protect them. An ever-increasing number of local governments are instituting their own historic preservation programs, assuming leadership in the protection of their own valued heritage. Indian tribes are establishing similar programs to ensure the preservation and continued use of places whose cultural value to them spans millenia. These changes cannot necessarily be attributed to the enactment of the National Historic Preservation Act alone; rather, they reflect a broad pattern of social change, a maturing of American civilization, and a growing recognition that our heritage is a rich, worthy one that will sustain us in the present and into the future. The act, however, has given American historic preservation a set of central organizing concepts and provides a variety of vital tools for use in the Nation's movement toward conserving and making wise use of its historic places.

The Advisory Council on Historic Preservation

This Assessment has been prepared by a task force of the Advisory Council on Historic Preservation. Appendix I lists all current members of the Council and identifies the members of the task force.

The Council was created by the National Historic Preservation Act to advise the President and Congress on historic preservation matters, to review Federal undertakings that affect historic properties, and to carry out other leadership functions in the national program. The Council has 19 members, including citizen and expert members appointed by the President, representatives of the National Trust for Historic Preservation and the National Conference of State Historic Preservation Officers, and ex officio representatives of Federal agencies. The Council shares leadership of the national historic preservation program with the Secretary of the Interior, who is responsible for the maintenance of the National Register of Historic Places and for the administration of grants-in-aid to the States and the Trust.

Relationship to Other Reports

This Assessment has benefited from several other reports and studies prepared in connection with the anniversary of the act. The Council's professional staff reviewed questionnaires returned by State Historic Preservation Officers and Federal agencies to the House of Representatives' Subcommittee on Public Lands during a survey of the national historic preservation program conducted by the subcommittee in 1985. The task force also reviewed summary reports on this survey prepared by the General Accounting Office. The Council's professional staff conducted an exhaustive analysis, reviewing on a section-by-section basis how the National Historic Preservation Act has been implemented. This resulted in an internal report entitled Implementation of the National Historic Preservation Act: An Analysis.

Another report on how the National Historic Preservation Act has been implemented has been prepared by the Department of the Interior, as required by Section 504 of the act. A draft of the "Section 504 Report," which closely parallels the organization and scope of the Council staff's Analysis, was shared with the task force by the Department of the Interior.

The task force has distilled 11 major topics for discussion out of the questionnaire responses, the staff's Analysis, the "Section 504 Report," and other data sources and has reached its own conclusions. This distillation, and these conclusions, are represented in the Assessment that follows.

SECTION 1
FEDERAL-STATE-LOCAL-PRIVATE RELATIONSHIPS

Introduction

The national historic preservation program is carried out as a partnership among the Federal Government, State governments, local governments, and private interests. In general, the Federal Government provides guidelines, technical assistance, and grants-in-aid and monitors its own activities to ensure that they do not do unnecessary harm to historic properties. State Historic Preservation Officers (SHPO's) coordinate the program at the State level; assist local governments and the interested public; advise Federal, State, and local agencies about preservation matters; and carry out other aspects of the national program on behalf of the Federal Government. On-the-ground preservation work takes place primarily at the local level through local governments, nonprofit organizations and institutions, corporations, and interested individuals, with the assistance of the Federal and State governments.

All who participate in this partnership are committed to maintaining its vitality and strength. As with any collective effort, questions arise from time to time about how responsibilities are to be shared and about precisely what the responsibilities of the various participants are. Of those that have arisen over the years, the following four are important enough to justify considering legislative changes in the National Historic Preservation Act (NHPA).

Question 1: Should activities now carried out by the Federal Government be decentralized to the SHPO's? Such activities include maintenance of the National Register of Historic Places, review of Federal projects affecting historic properties, and review of rehabilitation projects for which developers claim investment tax credits. Today, both the SHPO's and either the National Park Service or the Council carry out each of these activities. Some feel that this is duplicative; others feel it is necessary to provide quality control.

Recommendations: We believe that it would be desirable for SHPO's to carry out program activities on behalf of the Federal Government with a minimum of duplication of effort, provided adequate Federal oversight is ensured and provided opportunities exist for members of the public to appeal SHPO decisions. Thus it would be desirable to explore decentralizing appropriate Federal historic preservation activities to the SHPO's, with provision for Federal standard-setting, monitoring, and audits, and for appeals to Federal authorities when differences occur at the State level. Such decentralization should not be taken to mean a lessening of Federal responsibility for historic preservation, however; the Federal Government must retain ultimate responsibility for its actions affecting historic properties, whether positive or negative, and maintain a positive partnership with the SHPO's in the conduct of their responsibilities. It must also be recognized that assigning Federal responsibilities to the States requires that the States be provided adequate administrative and financial assistance by the Federal Government.

Question 2: Should some activities be delegated even further, to local historic preservation programs? Under the Certified Local Government (CLG) program created by amendments to NHPA in 1980, local programs now share in historic preservation grants-in-aid made to the States and are delegated various responsibilities by SHPO's. Some local governments support increased delegation, which would appear to be consistent with the Administration's emphasis on decreasing the role of the Federal Government in local affairs. Some preservationists believe that such delegation could reduce the present level of quality control, and some Federal agencies and regulated industries are concerned about the management problems that could arise if their projects were subject to historic preservation review by multiple local program officials.

Recommendations: In principle, we believe that further delegation to Certified Local Governments should be explored, but care must be taken to avoid creating an unduly complicated system. We believe that this matter needs further study, while the CLG program matures.

Question 3: Does NHPA provide adequately for timely public participation in decisionmaking? The act explicitly mandates public participation in nominations to the National Register. It establishes public representation on the Advisory Council on Historic Preservation, provides generally for cooperation with members of the public by SHPO's and Certified Local Government preservation programs, and permits the award of attorneys' fees to members of the public who enter into litigation under its provisions. Otherwise, it is unspecific about public participation. The Council's regulations emphasize public participation in Section 106 review. Standards and guidelines for historic preservation planning issued by the Secretary of the Interior emphasize public participation in planning activities, and Interior reviews SHPO programs for adequacy of public participation. Citizen groups and members of the public often call for more and more timely public participation and are critical of what they perceive to be pro forma agency efforts to meet the letter, but not the spirit, of public participation requirements. Federal agencies tend to object to public participation requirements based on NHPA in the belief that their internal procedures are sufficient to ensure open, informed decisionmaking.

A variant on this question has to do with participation by volunteers in historic preservation activities carried out by Federal agencies and SHPO's. Historic preservation has become professionalized during the last two decades, and some believe that the vital contributions to be made by community volunteers are being discouraged. Others worry about how to maintain quality control and attend to agency budgets and schedules if nonprofessional volunteer participation is encouraged.

Recommendations: We believe that provisions for public participation in Interior and Council regulations, standards, and guidelines are adequate at present, but that it might be desirable to give these provisions more explicit support in NHPA itself, and specifically to give encouragement to volunteer participation. Any provision for public participation, however, should allow for flexible application, recognizing the diversity of actions and publics involved. It should emphasize meaningful, active participation

by interested persons, and it should complement, not conflict or overlap with, existing agency procedures.

Question 4: Is there adequate provision for participation by regulated industries and other nongovernmental parties affected by actions under NHPA? Representatives of the coal, oil, and gas industries and private land developers sometimes express concern about decisions made during review of their projects under NHPA that cost them time or money but in which they are not allowed to participate. Federal agencies responsible for making decisions about licenses and permits, on the other hand, sometimes object to allowing applicants for such entitlements to participate in historic preservation review, feeling that this responsibility is solely that of the regulatory agency and that applicant participation reduces objectivity.

Recommendations: We believe that private industry and other affected parties have rightful roles in historic preservation activities. Participation should be understood to mean taking part in a process as one of several interested parties. Industry participation should be perceived by regulatory agencies as positive and complementary to agency decisionmaking processes.

SECTION 2 IDENTIFYING HISTORIC RESOURCES

Introduction

Historic resources are identified by States, local governments, Federal agencies, and private citizens through State and local survey and registration processes and through nominations to the National Register of Historic Places. Identification is also a key part of compliance with Section 106 of NHPA, which requires Federal agencies to "take into account" the effects of their actions on historic properties. In order to take effects into account, agencies must identify properties subject to effect.

Three questions have been raised about NHPA's identification requirements, with suggestions that legislation is needed in order to clarify these requirements.

Question 1: Are there types of properties that should receive more or less, or different kinds of, attention? NHPA pertains to "districts, sites, structures, buildings, and objects" that may be eligible for the National Register of Historic Places by virtue of their significance in American history, architecture, archeology, and culture.

Some users of NHPA have pointed out that there are kinds of historic properties that do not fit comfortably within the categories of "districts, sites, structures, buildings, and objects." Such property types include historic shipwrecks, historic landscapes, natural areas of traditional historic importance to American Indians and other Native American groups, and "networks" (e.g., road and trail systems).

Other users, while not questioning the scope of the act's coverage per se, suggest that special types of properties should be singled out for special consideration. These include:

- o Relatively simple archeological sites important only for their research potential, which some suggest should be given a lower level of consideration because this potential can ostensibly be realized through archeological data recovery;
- o Buried or submerged archeological sites, which some believe need special consideration because they often are invisible on the surface of the ground or water and hence cannot be identified without expensive and sometimes destructive excavations;
- o Properties containing treasure, such as shipwrecks and some archeological sites, where some believe a need exists to balance the preservation of historical integrity against the economic interests of treasure-seekers;
- o Properties having cultural/religious value to particular groups, such as American Indian communities, whose identification may violate group cultural norms and whose management may require extensive consultation with representatives of concerned groups; and

- o Historic districts that coincide with ethnic or other socially recognized neighborhoods, where there is a need to consider social and cultural values as well as the aspects of properties per se in making management decisions.

Still others have proposed that NHPA's scope of coverage is too broad. For instance, it has been suggested that archeological sites should not be included under NHPA's purview. Another common proposal is that NHPA should give its primary attention to properties of national significance, leaving concern for properties of State and local significance to State and local authorities. Opponents of this point of view argue that it is properties of local significance that are, by definition, most significant to the American people "where they live" and most vulnerable to inattention by Federal agencies; hence, the Federal Government should be fully attentive to their identification and protection. They also suggest that some properties of national significance are determined as such on the basis of assumptions about what is needed to tell the story of America's history to the public, rather than on the basis of how much members of the public actually treasure the properties as parts of their valued historical environments. Thus, a focus on nationally significant properties would result in a Federal program of limited relevance to the public.

Recommendations: We believe that, in general, the range of property types covered by NHPA is appropriate. The diversity of America's history and culture demands that the full range of America's historic property types, including historic landscapes, shipwrecks, roads, trails, and places of traditional importance to Native American groups, be brought into the National Register. Since these types of properties are not specifically mentioned in the statute, however, questions continue to arise about the appropriateness of their inclusion.

The response to recognition that a given class of clearly significant properties is not specifically mentioned has sometimes been to amend the act to provide the specific reference. We question the wisdom of this approach. Specific inclusion of one category of properties, we feel, only raises questions about why other categories are not specifically referenced, generating uncertainty, proposals for still more amendments to the act, and the impression of a limitless, all-inclusive National Register. A better approach might be to address the general definition of historic properties given in the act, to make it clear that the act is concerned with all significant physical manifestations of American history and prehistory, including but not limited to districts, sites, buildings, structures, and objects.

Certain types of properties require particular approaches to their identification and management, but we do not believe that it would be appropriate to attempt to set forth these specific approaches in the act itself. The varying property types and management needs involved do not lend themselves to approaches that could be readily embodied in statutory language. In recent years, under its regulations, the Council has established programmatic agreements with agencies about how specific classes of properties are to be identified and managed. Individual SHPO's (e.g., California) are also exploring this approach. We believe that such

efforts should be encouraged administratively, but that no change in the statute is needed.

We do not believe that the President and Congress should support the idea of giving different levels of attention to properties at different levels of significance as formally defined by the Secretary of the Interior. We think it imperative that the Federal Government ensure that its actions are sensitive to the values that citizens at the local level ascribe to their historic properties. This requires that in Federal agency planning, at least as much attention should be given to properties that local people view as important in their history as to those professionally determined to be useful in commemorating or interpreting historical events of national scale.

Question 2: Are the responsibilities for identifying historic properties efficiently and realistically allocated and coordinated? Historic properties are identified by SHPO's and by local governments, academic institutions, organizations, and individuals coordinated by the SHPO as part of the comprehensive statewide survey and inventory program established as a SHPO responsibility by NHPA. Federal agencies are assigned a general responsibility by NHPA to carry out programs to identify and nominate to the Secretary of the Interior all properties they own or control that might be eligible for the National Register. Federal agencies, and non-Federal parties that receive assistance or permits from Federal agencies, identify historic properties in advance of construction projects and other undertakings in order to take into account the effects of such projects on historic properties.

Some land-managing agencies object to the implicit requirement that they identify and nominate to the Secretary of the Interior all properties eligible for the National Register. They point out that because of budgetary restraints and the vast land areas for which they are responsible, this is a nearly impossible task. Some also suggest that nomination of properties, with all the documentation such nomination entails, has no necessary relationship to the management of such properties.

Especially in the context of large undertakings (surface mines, well fields, etc.), it is efficient to use predictive modeling to determine the likely general distribution of different types of historic properties and to develop plans for their protection on the basis of such modeling, rather than to identify individual properties at the earliest stages of planning. "Predictive modeling" means developing predictions about where historic properties of various types will be found, based on historical, anthropological, and other data and theory, and then testing these predictions through field survey that usually involves inspection of less than 100 percent of the land under consideration. Some feel that because predictive modeling permits some land areas to go physically uninspected, it does not guarantee identification of all historic properties, and that it thus violates the letter of NHPA and may permit unidentified properties to be destroyed.

In urban contexts, special opportunities and problems are involved in the identification of historic districts, which tend to comprise whole neighborhoods or commercial areas. Such districts present unique opportunities to preserve America's heritage on a large and living scale. Problems arise, however, in determining what responsibility a Federal agency whose actions may affect a possible historic district should have for identifying it and defining its significant characteristics, and for determining how Federal preservation responsibilities should be carried out in the context of State and local environmental, preservation, and planning laws.

Some agencies and non-Federal parties that operate with Federal assistance or licenses believe that the responsibility to identify historic properties is vested in the SHPO and/or the Secretary of the Interior. On this basis, they propose to take effects on historic properties into account only when the SHPO and/or the Secretary identifies such properties within their project impact areas. In part, this position draws support from ambiguous language in the Archeological and Historic Preservation Act of 1974.² Opponents of this position point out that neither the SHPO nor the Secretary is funded to conduct the surveys necessary to carry out such identification, and as a result the project proponent must identify them if effects on historic properties are to be taken into account.

NHPA does not presently address the cost of resource identification, other than to authorize agencies to spend money on identification and to provide grant funds to the SHPO's for that purpose. The costs of identification (or other preservation activities) are not compiled and maintained in any centralized way by the Federal Government. Many perceive costs to have increased over the years because of inflation, limited access to skilled labor, increasingly stringent survey standards, and increasing demands for documentation by the National Register and others. NHPA presently provides no mechanism whereby the proponent of an undertaking and those concerned about historic properties negotiate an agreed-upon level and type of identification effort. Proposals are sometimes offered for setting dollar limits on the amount that can be spent on surveying in advance of a given undertaking. These proposals invariably founder on the diversity of undertakings, properties, areas, and impacts involved, which render such limitations arbitrary in the extreme.

States, Federal agencies, and the National Register of Historic Places are all in the process of computerizing their inventories of historic properties. Except in a few areas of the Nation (New Mexico is a good example), these efforts are not coordinated, and the different computer systems used by the different inventories are unable to communicate effectively. It may be that this results in inefficiencies.

The costs of conducting identification activities on Federal lands are not allowable under the historic preservation grants program administered by the National Park Service (NPS). The justification for this position is that the cost of such identification should be borne by the land-managing agencies, not by NPS through its grants to the SHPO's. Western SHPO's, while not disagreeing in principle, point out that, considering the amount of land in many western states which is in Federal ownership, it is very difficult to carry out useful surveys without inspecting Federal lands.

Recommendations: We believe that Federal land-managing agencies need relief from the implicit requirement that they identify and nominate all historic properties to the National Register. A more realistic and productive approach would be to charge agencies with the maintenance of ongoing programs to manage historic properties under their care, including the conduct of identification and registration programs at a level of detail appropriate to the management of the properties involved. In the context of management-driven identification programs, it should be emphasized that predictive models are appropriate and useful.

A detailed study is needed that addresses the identification and protection of historic districts and determines the need for improved Federal policy as to what constitutes such a district, how local governments can be encouraged to participate in their identification, and how State and local governments can be encouraged to afford them protection in the consideration of non-Federal actions that may affect them. Such a study can be undertaken by the Council under the general advisory authorities given it by the act.

The responsibility for the conduct of identification efforts should remain with the agency whose undertakings affect historic properties or that is responsible for managing the land on which such properties exist. When multiple agencies are involved, agreements should be reached assigning such responsibilities. Transferring identification responsibilities to the Secretary of the Interior or the SHPO's, while potentially beneficial from the standpoint of coordination, would create problems of disjuncture between the program needs of agencies and the funding and personnel available to the Secretary or the SHPO's.

A definite effort is needed to control the costs of identification, but statutory changes are not required. More vigorous attention to this area by the Council, Interior, and the SHPO's is in order, perhaps coupled with executive branch direction to the agencies to explore cost-effective alternatives to current practices -- for example, interagency cooperation to combine small identification efforts into larger, regional packages to achieve economies of scale. Such programs of cooperation, extending to the SHPO's and local governments, should also address the coordination of information management systems.

We believe it would be advisable for the Department of the Interior to give more consideration to the needs of western SHPO's in the conduct of identification efforts on Federal lands. Although Interior's unwillingness to assist in identification efforts for which other agencies are rightly responsible is understandable, the result does appear to discriminate against western SHPO's and may require rethinking. This should not require amendments to the statute, however.

Question 3: Should the focus of NHPA be broadened to include a concern for intangible resources such as folklife and related traditional lifeways? It has been proposed that intangible cultural resources be specifically identified, evaluated, and given consideration under NHPA. "Intangible" resources include folklife and related traditional lifeways and are the

topic of a report and recommendations prepared by the Secretary of the Interior and the American Folklife Center.³ Such resources are now considered under NHPA only to the extent that they have some sort of a property referent, that is, only to the extent they are somehow linked with a physical site, area, structure, or object that is eligible for the National Register of Historic Places. Some maintain that this creates an unbalanced approach to preservation of the Nation's history, promoting a bias toward its physical leavings rather than giving attention to its most dynamic elements. The Interior/Folklife Center report recommends both administrative and legislative actions to correct this imbalance. Both the Council and the National Park Service have begun to implement the report's administrative recommendations, but its legislative recommendations have not yet been addressed.

Some preservationists and Federal agencies are concerned about the difficulties inherent in incorporating intangibles into a system that has traditionally been property oriented without distorting either the system or the intangibles themselves, and without creating substantial administrative burdens. For example, the National Register of Historic Places is central to the current national historic preservation program. To include intangibles in the National Register would require the classification and registration of living groups and their traditions, a matter fraught with social and political complications.

Recommendations: We do not believe that the purview of NHPA should be broadened by legislation to include intangible resources at this time. Although sympathetic to the interests of those who see preservation of traditional lifeways as central to the national preservation mission, we feel that to include resources that lack property referents in the national historic preservation program would create formidable complications. The recommendations of the Interior/Folklife Center report should be studied further, however, and when administrative actions can be undertaken to carry them out, they should be pursued. Intangible cultural values that are related to tangible historic properties should be given full consideration in preservation planning, and a policy-level working group should be established, under the Council's general advisory authorities, to investigate alternatives for implementing the Interior/Folklife Center report's recommendations.

SECTION 3
CONSIDERATION OF HISTORIC PROPERTIES
IN PLANNING FEDERAL UNDERTAKINGS

Introduction

NHPA requires Federal agencies to consider the effects their undertakings may have on historic properties. The basic mandate is set forth in Section 106 of the act, which directs agencies to take such effects into account and to afford the Council a reasonable opportunity to comment. A narrower but more stringent standard is set by Section 110(f), which requires agencies to undertake "planning and actions...to minimize harm," but only when their undertakings will have direct adverse effects on National Historic Landmarks.

Procedures for implementing both requirements are set forth in the Council's regulations.⁴ The regulations emphasize consultation with the SHPO and other concerned persons to identify and, when possible, adopt alternatives to avoid or reduce damage to historic properties.

There has been intense controversy over the meaning of Section 106 and over the appropriateness of the Council's regulations. Questions about the application of Section 110(f) have begun to arise only recently, probably reflecting the fact that this section was not added to the act until 1980.

Question 1: To what extent should the Council require that agencies engage in timely consultation and seek agreement on ways to avoid or reduce damage?

This question is at the heart of the controversy over the meaning of Section 106. The Council has maintained that it has the authority to establish such requirements, and that they comprise the most reasonable way to identify and resolve conflicts between historic preservation and agency missions. Critics deny that the Council has the authority it claims, suggest that the Council seeks a more regulatory role over agency undertakings than Section 106 envisions, and insist that the Council restrict itself to commenting on agency actions presented to it for review.

Congressional expressions on the subject have been largely supportive of the Council, and proposals have been offered to incorporate provisions for consultation and agreements into Section 106 itself or into the Council's rulemaking authority. Others have proposed strengthening Section 106 to prohibit Federal disturbance of a historic property unless there is no prudent and feasible alternative to doing so. Another proposal has been to incorporate some of the language of Section 110(f), requiring "planning and actions...to minimize harm," into Section 106.

On July 21, 1986, the Council unanimously adopted final revisions to its Section 106 regulations that at least temporarily resolved the interagency conflict over Section 106's meaning.⁵ The new regulations, which were published in the Federal Register on September 2, 1986, at 51 FR 31115 for effect on October 1, 1986, retain an emphasis on consultation to resolve preservation/development conflicts and provide for the balancing of agency program objectives and historic preservation values. The regulations cannot resolve the underlying questions about what Section 106 should say,

however, and they do not address the interest expressed in strengthening this section's protective provisions.

Recommendations: Consultation with interested parties, and the establishment of agreements when possible, should be retained as central elements in the implementation of Section 106, as they are in the regulations adopted on July 21. At present, however, no consensus exists within the Council as to whether amendments are needed to NHPA to undergird the Council's emphasis on consultation and agreements. Many Council members feel that the Council's revised regulations provide adequately for consultation and agreement, making statutory changes unnecessary. On the other hand, some members feel that questions about the legitimacy of consultation and agreements will continue to arise until either Section 106 or the Council's rulemaking authority is amended to include such provisions explicitly.

We do not believe that Section 106 should be amended to require that historic properties not be disturbed unless no prudent and feasible alternative is available. Our experience indicates that this is too strict and inflexible a test to be applied to all kinds of effects on all kinds of historic properties. While not vital, an amendment to include in Section 106 the "planning and actions" language from Section 110(f) would help clarify the intent of Section 106 review.

Question 2: Are changes needed in Section 110(f) to clarify its intent and meaning? The intent of Section 110(f) is subject to multiple interpretations. Some preservationists have expressed the belief that, by singling out National Historic Landmarks for special consideration, Section 110(f) encourages agencies to reduce the attention they give to locally significant properties. This is viewed as a problem because locally significant properties are particularly vulnerable to damage by Federal agency undertakings and may be of more day-to-day importance to members of the public than are properties of national significance in the commemoration or interpretation of American history.

Another source of concern about Section 110(f) is the limitation on its application to "direct and adverse" effects on historic properties. Some Federal agency officials propose that this restriction be applied to Section 106 as well, on the theory that Congress could not have intended to give consideration to a wider range of effects on properties of State and local significance than to effects on National Historic Landmarks.

There is no evidence that Congress intended to lessen the consideration given to locally significant historic properties when it added Section 110(f) to the act, nor that it intended to limit the kinds of effects that could be considered under Section 106. The similar but divergent language of the two sections, however, continues to generate uncertainty and confusion.

Recommendations: Changes are needed in Section 110(f) to eliminate the confusion it creates. The utility of this section is uncertain, and little might be lost if it were eliminated altogether, since effects on National Historic Landmarks would continue to be reviewed under Section 106. If

Section 110(f) is not removed, it should be amended to make the range of effects it addresses equivalent to that covered by Section 106. Limiting consideration to "direct and adverse" effects is impractical. In many cases, effects are not unambiguously adverse or beneficial, direct or indirect. An attempt to exclude from consideration effects that are not direct and adverse would lead only to endless disputes.

Question 3: Is action needed to ensure earlier review of Federal undertakings under Section 106?

Federal agencies are clearly required to comply with Section 106 before taking action on their undertakings; this is obviously necessary in order to allow the Section 106 review to address alternatives to the action proposed and to permit the Council to render meaningful comments. In theory, review should take place early in project planning, but this does not always happen. The Council has repeatedly had to contend with situations in which agencies have delayed compliance with Section 106 until so late in project planning that few, if any, alternatives could be realistically considered. As a result, the Council's opportunity to comment has been severely constrained, if not precluded. In most cases, such delays have apparently resulted from inexperience on the part of the agencies involved; occasionally an intent to frustrate Section 106 review has been a possibility.

Recommendation: Consideration should be given to issuance of executive direction to Federal agencies, and if necessary to amendments to NHPA, to encourage agencies to comply with Section 106 early in planning.

Question 4: Is action needed to encourage better compliance with the terms of agreements developed under Section 106 and to monitor such compliance?

The Section 106 review process usually results in agreements about actions to avoid or mitigate the adverse effects of Federal undertakings; agencies are then expected to carry out these agreements as their undertakings go forward. In most cases, the agreements are carried out in an orderly manner, but sometimes they are not honored, or are honored only in part. Such a result defeats the entire purpose of Section 106 review. Although in theory the Council can seek enforcement of agreements through the courts, in practice it is extremely unlikely that the Council would enter into litigation against another Federal agency.

A related problem is that the Council lacks a mechanism for monitoring how and whether agreements are carried out. Efforts to encourage Federal agencies to report the results of their work under agreements have generally been unsuccessful, and the Council and SHPO's lack the staff resources to make systematic independent monitoring feasible.

Recommendation: Consideration should be given to executive direction requiring agencies to establish systems to ensure that the terms of agreements with the Council and SHPO's are carried out in an orderly manner for the duration of each agreement, and that progress in implementing agreements is periodically reported to the Council.

SECTION 4
OTHER FEDERAL AGENCY RESPONSIBILITIES

Introduction

Federal agency responsibilities, other than those imposed by Section 106, are set forth in Section 110 of NHPA. In brief, agencies are responsible for identifying historic properties under their ownership or control, using such properties in a manner consistent with their preservation, documenting such properties if they must be destroyed or substantially altered, and generally carrying out their missions in a manner consistent with the purposes of the act, to the extent feasible.

Federal agency performance with respect to these responsibilities varies on both an agency-to-agency basis and within particular agencies on a region-to-region basis. Variability in performance may reflect the recency of Section 110's addition to the act, its precedents, and the lack of guidelines regarding its implementation. Section 110 was added to the act in 1980; much of its language was derived directly from Executive Order 11593, issued in 1971. Executive Order 11593 was directed largely at land-managing agencies, or at least was so interpreted. As a result, Section 110 has also been interpreted to apply primarily to land-managing agencies, and agencies that manage buildings, issue permits or licenses, or provide assistance to non-Federal parties have been unsure about the extent to which its requirements apply to them. Section 110 does not parrot Executive Order 11593 exactly, however. Section 110(a)(1) speaks directly to the appropriate use and management of historic buildings, Section 110(b) refers explicitly to projects assisted by Federal agencies, and Section 110(d) refers to licenses and permits. The responsibilities assigned to Federal agencies by these and other subsections of Section 110 are not widely understood. As of this writing, only draft guidelines have been issued interpreting Section 110 and providing guidance on its implementation.⁶ These have received substantial criticism and are being reviewed before being finalized.

In the half-decade since Section 110 was added to the act, a number of questions have arisen about its requirements and about how to make it more effective. Notable among these are the following:

Question 1: Should agencies that use and maintain historic buildings, or that could do so, be provided with further direction? Despite Section 110's requirements, some agencies do not consider the use of historic buildings to fulfill their space needs, preferring instead to construct or lease new buildings. Use of a new building is often more costly than adaptive use of a historic building would be and may preempt uses that would otherwise occur in a historic building, hastening its demise. Agencies that do maintain and manage historic buildings are not always aware of proper maintenance procedures and as a result damage historic buildings by using methods such as abrasive cleaning of masonry, installing inappropriate new windows, and gutting significant interior spaces when less damaging, and often less expensive, alternatives are available.

Recommendations: Amendments to Section 110 should be considered to give agencies more direction in the use of historic buildings to serve their needs and in the proper maintenance of such buildings. Administrative action (Presidential memorandum or executive order) should be considered to encourage agencies to give more serious priority to the use of historic buildings for program purposes, to ensure that rehabilitation of such buildings is done in a manner sympathetic to their historic and architectural qualities, and to ensure that they are properly maintained.

Question 2: Should more encouragement be given to historic preservation planning? Agencies that engage in land-use planning and planning for the long-range use of buildings do not always, or even very often, take historic preservation possibilities into account. When historic preservation is considered, it is often viewed solely as a constraint on planning and development, rather than as a creative opportunity. Properly carried out, historic preservation planning can be an important mechanism to integrate historic preservation into ongoing agency programs and eliminate conflicts between agency missions and historic preservation before they occur.

Recommendations: Either amendments to Section 110 or some form of administrative action should be considered to highlight the need to incorporate historic preservation in a positive and timely way into land-use planning and planning for the use of buildings. Historic preservation should be a part of every land-use or building-use plan when historic properties may be involved.

Question 3: Should Section 110 speak more directly to permitting and licensing non-Federal undertakings? Situations in which a Federal agency issues a permit or license for a non-Federal action present particular kinds of historic preservation problems that are not shared by situations in which Federal land or direct Federal project management is involved. At present, Section 110 does not speak very clearly to such situations, and as a result its directions are not regularly followed by agencies responsible for permits and licenses.

Recommendations: It would be desirable to add a subsection to Section 110 addressing the specific problems of permitting and licensing situations.

Question 4: Should Section 110 give more direction to agencies that assist in local and regional planning by non-Federal entities? Questions have arisen about the extent to which Section 110 (and Section 106 as well) apply to Federal programs that assist State and local agencies in carrying out activities related to land-use planning, for example coastal zone management and issuance of permits for surface mining. Section 110 does not address these kinds of programs directly, which has led to major debate and even litigation in some cases. Since such programs involve the Federal Government in local planning and decisionmaking, at least as the provider of financial support for such activities, important legal and even constitutional questions arise about the extent to which Federal agencies that assist such programs can carry out national historic preservation policies and procedures. Practical problems arise, too, in the application of Federal procedures, which tend to address specific project impacts on specific properties, to programs in which the Federal Government assists

only plan development rather than the conduct or approval of specific projects.

Recommendations: Considering the extent to which the Federal Government in recent years has become a partner in local, regional, and State planning activities, special direction to agencies participating in such activities would be appropriate, either in the form of additions to Section 110 or through administrative action. Such direction must take careful account of the legal and practical problems involved. A policy-level working group can be established under the Council's general advisory authorities to explore this matter further.

SECTION 5
ADVISORY COUNCIL REVIEW OF AGENCY PROGRAMS

Introduction

Section 202(a)(6) of NHPA establishes as a function of the Council the review of Federal agency programs and the offering of recommendations about how to make such programs consistent with the purposes of the act. Council review could be important in improving Federal agency compliance with the broad purposes of the act, but the Council has undertaken this function only sporadically. The great bulk of Council staff time has been consumed in work with Federal agencies on individual projects, which are reviewed by the Council under Section 106, and it has not been feasible to undertake very substantial agency program review.

Question: Should the Council give greater emphasis to its program review function? Sometimes this is proposed as an alternative to the Council's traditional role in reviewing individual Federal agency undertakings. It is argued that the Council should pay less attention to individual undertakings and more to program review. In other instances, increased program review is proposed as something the Council should do in addition to its project review activities.

The Council has long been interested in increasing its program review role, but has seen as its first duty the efficient administration of project review activities. As a result, program review has been done on a catch-as-catch-can basis. Increasing attention to this function would require either increased Council budgets or less attention to project review. Revised Council regulations⁷ may make the latter feasible, but until the regulations have been implemented by all agencies, it is premature to assume that the Council's project review burden will decrease.

Recommendations: No legislative changes are needed to increase Council program review. We believe that program review can be an important way to encourage greater and more positive attention by Federal agencies to their historic preservation responsibilities and opportunities, and that with implementation of the revised regulations it should be possible to give this Council function increased prominence. The need to provide enhanced program review should be considered during review of the Council's FY 1988 budget, and a Council working group should be established to seek ways to enhance program review.

SECTION 6
FUNDING HISTORIC PRESERVATION ACTIVITIES
CARRIED OUT BY NON-FEDERAL PARTIES

Introduction

At the present time, the Federal Government provides financial assistance to a number of non-Federal entities to assist them in carrying out historic preservation activities.

- o The Department of the Interior apportions grants from the Historic Preservation Fund to the States. Grants-in-aid cover approximately one-half the costs incurred by the State Historic Preservation Officers in carrying out the functions given them by NHPA; States, local governments, and nongovernmental contributors defray the remainder of the costs. Functions assigned to the States include identifying historic properties, reviewing Federal undertakings, participating in the certification of properties and projects for tax benefits, certifying local preservation programs, doing statewide preservation planning, and giving preservation assistance to Federal agencies, State and local governments, private enterprises, and the public. Subgrants for "brick and mortar" construction projects, typically the restoration or rehabilitation of historic buildings, are authorized by the act, but funds have not been appropriated for this purpose for several years, except by the Emergency Jobs Act in 1983.
- o The Department also provides an annual grant-in-aid to the National Trust for Historic Preservation to assist the Trust in carrying out programs under its charter, which was approved by Congress in 1949. Since the peak of program funding in the late 1970's, the Trust has received on the average \$3 to \$4 million each year; in the last few years it has matched its grant with non-Federal contributions at a rate of about 5 to 1. The Trust maintains ten National Historic Landmarks and a number of other historic properties, assists local preservation groups, publishes books and other documents pertaining to preservation, undertakes litigation and other advocacy activities on behalf of parties concerned with preservation issues, and otherwise serves the preservation-oriented public.
- o Historic preservation tax credits (HPTC's) are allowed by the Internal Revenue Service for taxpayers who have rehabilitated historic commercial structures and income-producing residential properties in accordance with standards established by the Secretary of the Interior.
- o A wide variety of Federal economic assistance programs can be used by assistance recipients, at their discretion, to support preservation activities, notably rehabilitation of historic buildings. Such programs include the Community Development Block Grant (CDBG), Urban Development Action Grant (UDAG), Rental Rehabilitation Grant, and Housing Development Action Grant programs of the Department of Housing and Urban Development; the Housing Preservation Grant program of the Farmers Home Administration; the Library Services program of the Department of Education; and the Institutional Conservation program of the Department of Energy.

- o Grant-giving agencies such as the National Science Foundation and the National Endowment for the Humanities give occasional grants to support preservation-related purposes (e.g., historical and archeological research).
- o Federal agencies sponsor historic preservation work to meet their internal needs in response to various provisions of NHPA. These include archeological surveys and data recovery, recordation of historic buildings, and rehabilitation. Such projects are usually carried out under contract by non-Federal entities, particularly academic institutions and private firms.

For the last several years, the President's budget has not included funds for grants-in-aid to the States and the Trust, but funds have been restored each year by the Congress. Other programs that support preservation directly, such as CDBG and UDAG, have been scaled back but continue to be funded, and funds have continued to be appropriated for Federal agency historic preservation projects. Although deletion of the HPTC for historic rehabilitation has been proposed, the HPTC has been retained with some modifications in current tax legislation.

Question 1: Should the historic preservation tax credit program be continued? The HPTC program is criticised by some for three reasons: its denial of revenue to the Treasury, the seeming undue advantage it gives to wealthy developers and investors, and the perception that it distorts the national program, causing SHFO's and others to devote more time and energy to the identification and consideration of commercial properties at the expense of other property types. Generally, however, the HPTC program is regarded as a resounding success. It has pumped some \$8 billion into the economy since 1982, saved thousands of historic commercial and residential buildings, revitalized depressed urban areas in cities across the Nation, and created over 300,000 jobs.⁸

Recommendations: The Council's 1983 Report to the President and Congress on Federal Tax Law and Historic Preservation concluded that "the... tax credit for certified rehabilitation of certified historic structures has been an effective tax incentive for stimulating private investment in the preservation of significant historic buildings."⁹ We believe that this conclusion still holds and that the HPTC should be retained.

Question 2: Should grants-in-aid be continued? The States, the Trust, and the preservation community in general have strongly resisted Administration efforts to terminate the grants-in-aid program. Congress has agreed to retain the program, expressing concern that terminating grants would end reliable SHPO participation in such activities as survey, identification, registration, technical assistance, and review of Federal projects.

Proponents of terminating grants-in-aid assert that the State programs assisted by grants-in-aid are primarily valuable to the States, and that they have matured to a point at which Federal assistance is no longer needed. They suggest that States would continue to participate in these activities without Federal assistance because such participation is beneficial to the States. The States disagree, arguing that they in fact

are carrying out a Federal program, on behalf of the Federal Government, and must be reimbursed at least in part for their services. The States report that doing away with grants-in-aid would result in significant decreases in or total curtailment of such functions. This position may be self-serving on the part of the SHPO's, who obviously do not want to lose their Federal assistance, though it is difficult to understand why a State would voluntarily pay the total cost of an activity like providing technical assistance to Federal agencies. It is even more difficult to imagine how any degree of consistency could be maintained among those States that did choose to do so. Particularly in a time of shrinking operating funds at the State level, it appears very doubtful that significant State-level programs would be maintained in the absence of grants-in-aid. Similarly, while the Trust derives the bulk of its financial support from sources other than its annual grant-in-aid, it appears certain that eliminating the grant-in-aid would significantly reduce the scope of the services offered by the Trust to the preservation community.

Another argument in support of termination is that the HPTC program can effectively replace the grants-in-aid program, considering the high level of preservation-related funding generated by HPTC's, which is far more than that provided by grants-in-aid. However, the HPTC program directly supports the rehabilitation of only a narrow range of historic property types -- essentially, buildings used for income-producing purposes. It does not support the identification of other types of historic buildings, districts, archeological sites, and other classes of properties, nor does it support the review of Federal projects, the development of comprehensive plans, or the provision of technical assistance to Federal agencies, other agencies, and the public.

Seemingly, the only way to make the HPTC program replace grants-in-aid would be to charge developers a fee for the certification of buildings and rehabilitation projects and then use the proceeds to support the program activities that today are supported by grants-in-aid. If one assumes that about 6,000 applications for certification would be processed each year,¹⁰ this means that each applicant would have to be charged about \$3,300 in order to generate the \$20 million now provided in grants-in-aid. Some mechanism would also have to be developed to share the funds generated among the States, since the geographic distribution of HPTC-driven rehabilitation projects bears no necessary relationship to other historic preservation program needs and activities.

Recommendations: The Council is unable to reach consensus on this question. A number of Council members strongly support grants-in-aid, and the Council's 1981 Task Force on Federalism and Preservation recommended continuation of the existing program.¹¹ The Department of the Interior, however, argues forcefully in favor of termination.

Question 3: Should more grant-in-aid funds be passed through to Certified Local Governments? At present, each State must pass through at least 10 percent of its annual grant-in-aid to local governments that it has certified as meeting standards promulgated by the Department of the

Interior. Representatives of local governments periodically propose that this percentage should be increased.

Recommendations: Increasing the percentage of grant support passed through to local governments would have the positive effect of assisting preservation activities at the grassroots level. At current budget levels, however, it could seriously affect the ability of the SHPO's to carry out other program functions. Accordingly, an increase does not appear prudent at this time. In the absence of expanded appropriations from the Historic Preservation Fund for this purpose, alternative sources of additional funding for Certified Local Governments should be explored.

Question 4: Should the Historic Preservation Fund be converted into a trust fund? Appropriations for grants-in-aid are currently made from the Historic Preservation Fund, which is made up of revenues from offshore oil leases under the Outer Continental Shelf Lands Act.¹² The Legislation Committee of the National Conference of State Historic Preservation Officers has proposed converting the fund into a trust fund. Under this proposal, \$150,000,000 would be placed in the trust fund from offshore oil lease revenues each year. Appropriations would not be allowed to exceed \$50,000,000, and the remainder would be invested in public debt securities. The proposal proponents estimate that by 1997 the trust fund would be self-sustaining, generating sufficient interest to cover grants-in-aid at a level at least twice as high as at present, with no further transfers from offshore oil lease revenues. This approach would require a substantial investment over the next decade, however.

Recommendations: Since the Council has been unable to reach consensus as to whether grants-in-aid should be continued at all, we are not able to offer recommendations with respect to specific mechanisms for funding this program. If grants-in-aid are continued, the trust fund idea appears worthy of exploration, although there are obvious difficulties involved in pursuing it under current, constrained economic conditions.

SECTION 7
COORDINATION OF AUTHORITIES

Introduction

Historic preservation-related activities are carried out under a plethora of statutory authorities. Central to these is the National Historic Preservation Act, but a number of other statutes address general historic preservation concerns, concerns having to do with particular kinds of resources and concerns involving particular kinds of Federal agency activities. These include:

- o The Historic Sites Act of 1935,¹³ which gives the National Park Service broad authority to identify, study, designate, acquire, and manage historic properties;
- o The Archeological and Historic Preservation Act of 1974,¹⁴ which authorizes agencies to expend their funds on archeological salvage and requires notification of the Secretary of the Interior when archeological data may be disturbed by a Federal undertaking;
- o Section 4(f) of the Department of Transportation Act,¹⁵ which requires that transportation projects not use historic properties, public parks, recreation areas, or wildlife and waterfowl refuges if there are feasible and prudent alternatives to doing so, and that such projects include measures to minimize harm to such areas when their use cannot be avoided;
- o Section 533 of the Housing Act of 1949, as amended,¹⁶ which requires that certain housing projects advance national historic preservation goals and be done in accordance with professional preservation standards;
- o The Archeological Resources Protection Act,¹⁷ which prohibits disturbance of archeological resources on Federal and Indian lands without permits; and
- o Section 9 of the Mining in National Parks Act,¹⁸ which provides for the Secretary of the Interior to request a report from the Advisory Council whenever mining activity threatens a national historic or natural landmark.

Problems have arisen about how to coordinate the requirements of the various statutes, which sometimes overlap or appear to contradict one another.

Question: Should the various historic preservation authorities be consolidated into a single, comprehensive piece of legislation? Federal agencies and others have suggested that the national historic preservation program would be simpler and easier to understand if the various authorities were consolidated. Examples of specific problems of coordination are common. If its requirements were actually observed by Federal agencies, for instance, the Archeological and Historic Preservation Act would require a coordination with the Secretary of the Interior on many Federal undertakings that would be largely if not entirely redundant with coordination with the Council under Section 106 of NHPA. Section 9 of the

Mining in National Parks Act requires an exchange of documents between the Secretary of the Interior and the Council that may overlap with the requirements of Section 106 review, or alternatively may be applied to totally unrelated issues. Section 533 of the Housing Act, as amended, is inconsistent with Section 106; Section 533 requires that the comments of the Council be sought under a narrower range of circumstances than is required by Section 106. Regulated industries conducting work on Federal lands complain that requirements placed on archeologists doing contract work for them, pursuant to the Archeological Resources Protection Act, sometimes conflict with the requirements of agreements worked out under the National Historic Preservation Act. The relationship between Section 4(f) of the Department of Transportation Act and Section 106 of the National Historic Preservation Act has been the subject of litigation and is likely to be litigated further.

However, some provisions of law relating to historic preservation address such specific issues and concerns that it would probably be inappropriate to lift them out of their present statutory contexts and embed them in a single statute. The requirements of Section 533 of the Housing Act, for example, relate specifically to the rehabilitation of historic housing under a particular grants program. The requirements of Section 4(f) of the Department of Transportation Act relate specifically to transportation projects, and the provisions of the 1906 Antiquities Act¹⁹ go beyond historic preservation to authorize the creation of national monuments.

Recommendations: It would be advantageous to consolidate the historic preservation requirements of other generally applicable statutes into the National Historic Preservation Act. Agency-specific provisions of law, such as Section 4(f) of the Department of Transportation Act and Section 533 of the Housing Act, should not be consolidated, but adjustments should be made to eliminate inconsistencies and redundancies between their specific historic preservation provisions and the provisions of the National Historic Preservation Act, and to specify which statute should govern in cases in which agency-specific requirements may conflict with requirements that are applicable Governmentwide.

SECTION 8
LEADERSHIP OF THE NATIONAL HISTORIC PRESERVATION PROGRAM

Introduction

Leadership of the national historic preservation program within the Government is presently split between two agencies: the National Park Service (NPS), which is a branch of the Department of the Interior, and the Advisory Council on Historic Preservation.

NPS participation in historic preservation dates to the inception of the Service in 1916. "External" preservation programs (that is, programs outside the national parks) began in the 1930's, when the Historic American Buildings Survey was created to record historic buildings throughout the country. External programs expanded in the 1940's with the River Basin Archeological Salvage Program, initially carried out in cooperation with the Smithsonian Institution in advance of dam construction. The external programs were gathered together and given coordinated direction by the National Historic Preservation Act of 1966. The locus of responsibility for external preservation programs has varied over time; for example, during the Carter Administration these programs were removed from the National Park Service and assigned to another Interior agency called the Heritage Conservation and Recreation Service.

The Council was created by NHPA to provide independent review of Federal agency actions affecting historic properties and to provide general advice to the President and Congress on preservation issues. Initially, staff and administrative support for the Council was provided by NPS; in 1976, however, the Council was given full independent agency status. The events precipitating Council independence involved its review of projects proposed by the National Park Service, as it was perceived that a conflict of interest resulted from placing a body responsible for review of projects within an agency that undertook such projects, despite the independence that the Council in theory enjoyed.

Currently, NPS maintains the National Register of Historic Places; administers grants-in-aid to the State Historic Preservation Officers and the National Trust for Historic Preservation; certifies properties and rehabilitation projects for Federal tax benefits; provides technical services to States, Federal agencies, and the public in such areas as preservation planning, archeology, recordation, and application of rehabilitation standards; and carries out certain international preservation functions. In addition, as a land-management agency, NPS is responsible for the preservation and use of historic properties on lands under its jurisdiction.

The Council's central function is the review of Federal undertakings that may affect historic properties. The Council consults with agencies, SHPO's, and others to seek ways to minimize adverse effects on such properties. It also provides advice, special studies, and recommendations about historic preservation to the President, Congress, and Federal agencies; provides training related to its functions; offers preservation-related guidance to Federal agencies, SHPO's, local

governments, and the public; and carries out some international functions. The Council does not manage historic properties or other lands.

The somewhat overlapping functions and roles of NPS and the Council are widely viewed as confusing and to some extent duplicative. For example, both NPS and the Council may review a construction project that receives Federal financial assistance or permits (which triggers Council review) and Federal tax benefits (which triggers NPS review). Although both agencies in theory use the same standards to review projects, they typically are asked to review projects at different stages in development and do so from slightly different perspectives, based on their different legal mandates. The result may be differing conclusions about the appropriateness of a given project's approach to treatment of a historic property. Both agencies also become involved in archeological matters, again in theory using the same standards, but sometimes with substantially different interpretations.

NPS and the Council also are inevitably perceived, and sometimes perceive themselves, to be in competition. A sense of competition began with the Council's attainment of independent status and has escalated during the decade since. By the early 1980's, NPS was leading an effort by Federal program agencies to make fundamental changes in the way the Council reviews agency actions. The Council strongly opposed this effort, and as a result, relations between the agencies are characterized by considerable friction.

As of early 1986, two competing legislative proposals were under development to unify leadership of the national historic preservation program. One, developed by the Legislation Committee of the National Conference of State Historic Preservation Officers, would remove external preservation programs from NPS and merge them with the functions of the Council in a new Historic Preservation Administration. The other, drafted by NPS, would bring the Council under the authority of the Secretary of the Interior, implicitly returning it to NPS or to a new historic preservation bureau within Interior.

Question 1: Should leadership of the national program be consolidated?

Arguments in favor of consolidation are based largely on perceptions of the present system as overly complicated and duplicative. One writer has asserted that "anyone who needs information, guidance, or Federal preservation service is dazed by the complexity of the programs."²⁰ The existing system, in which NPS and the Council may become involved in the same project at the same or different times, occasionally with overlapping authorities and with the potential for reaching inconsistent conclusions, is seen as producing confusion, inefficiency, and waste. Conversely, a consolidated program leadership is seen as producing greater efficiency and effectiveness while being easily understandable.

Arguments against consolidation generally emphasize the desirability of maintaining checks and balances between NPS and the Council. For example, determining the eligibility of a property for the National Register is perceived to be a wholly professional activity that should be untainted by political, economic, or other public-benefit considerations, while decisions about the disposition of such a property must take such considerations into account. It is argued that if the National Register

functions and those involved in Section 106 review were embodied in the same agency, they would inevitably taint one another.

Recommendations: The Council has not reached consensus on this matter. We feel that the basic partnership among the Federal, State, and local governments and the National Trust should continue, with each partner assigned appropriate roles and responsibilities. We feel that one or more Federal agencies should have the roles of standard setting, the establishment of national goals, and program monitoring, and that other Federal agencies should adhere to such standards and goals, but we are unable to reach consensus on whether leadership should be vested in a single agency.

Question 2: If leadership were vested in a single agency, where should that agency be lodged in the Federal system? Proponents of independent agency status argue that it is vital to have leadership vested in an agency without competing or distracting responsibilities for development, land management, or the operation of parks. Lodging the agency within a large Department like Interior is seen as inevitably placing the small preservation program at a competitive disadvantage with other programs more central to the Department's mission for funding, personnel, and influence in decisionmaking. Proponents of placing the agency within Interior assert that it would benefit from access to Interior's prestige and its large number of internal preservation professionals, and that by being unequivocally a part of the executive branch, it would actually have more influence in decisionmaking than would an independent agency.

An alternative that has not seen significant discussion, but that seems a logical extension of the notion of simplification through consolidation, would be to remove leadership of the national program from the Federal Government altogether and lodge it in the National Trust for Historic Preservation, altering the Trust's charter to give it clear leadership responsibilities and authorities and establishing its accountability to the President and Congress for program administration.

Recommendations: No consensus has been reached by the Council on this issue.

SECTION 9
THE U.S. ROLE IN INTERNATIONAL HISTORIC PRESERVATION

Introduction

NHPA commits the United States to a role of leadership in international historic preservation. Traditionally, the United States has been a major financial contributor to international preservation programs and has often shown leadership in the support of technical, educational, and economic assistance programs related to preservation. In recent years, however, the United States has been less prominent in international historic preservation activities.

Question 1: To what extent can and should the United States be actively involved in international historic preservation efforts?

Since its withdrawal from the United Nations Educational, Scientific, and Cultural Organization (UNESCO), the United States has had fewer opportunities to participate in international preservation activities, as plans to increase participation in alternative multilateral preservation programs²¹ and to increase bilateral preservation activities as a substitute for UNESCO participation have on the whole not been implemented. The United States is a signatory of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property and has implemented this convention under the Convention on Cultural Property Implementation Act of 1983.²² The convention and the act establish mechanisms for the prevention of international trafficking in illicitly obtained antiquities and other cultural property. These mechanisms are rather cumbersome and apply in a very limited range of circumstances. Nevertheless, their implementation is opposed by some dealers in antiquities and art objects who are supporting legislation to weaken their provisions.

Legislation currently under consideration by the Congress (H.R. 4568) would reaffirm U.S. commitment to international cooperation in historic preservation, as well as natural resource conservation, and would clarify the responsibilities of the Secretary of the Interior and the Council to coordinate U.S. participation in such programs.

Recommendations: Considering the economic, military, and cultural influence that the United States wields in the world, the United States should be an active participant in efforts to preserve the diverse cultural patrimony of the planet. The Administration and the Congress should resist efforts to weaken the protections offered by the Convention on Cultural Property Implementation Act, and should encourage consultation among the diverse interests concerned with the international movement of cultural property to explore mutually satisfactory means of resolving their differences. Legislation similar to H.R. 4568, to coordinate U.S. participation in international preservation, should be supported. The Council, Interior, and the State Department should consult on developing specific measures to substitute for U.S. participation in UNESCO.

Question 2: What should U.S. agencies operating in other nations do with respect to historic properties endangered by their activities or by activities they assist? U.S. agencies operating overseas are required by

NHPA to take into account the effects of their actions on historic properties entered in the World Heritage List or on a host nation's equivalent of the National Register of Historic Places. There is no record of agency compliance with this requirement since it was added to the act in 1980. Certain U.S. agencies, notably the World Bank and the Agency for International Development, have undertaken historic preservation activities, however. The Council has received sporadic reports from preservationists practicing in other nations indicating that the activities of U.S. agencies, or projects assisted by U.S. agencies, have damaged historic properties. Such reports are always difficult, if not impossible, to verify without detailed study. The situation abroad, however, appears to be analogous to that in the United States before 1972, when Executive Order 11593 was issued, requiring Federal agencies to identify historic properties subject to effect by their actions and take steps to protect them. Before Executive Order 11593, historic properties in the United States were routinely destroyed by most Federal agencies involved in construction and land use. Since there is nothing equivalent to Executive Order 11593 that applies today to Federal agency actions abroad, analogy suggests that the reports of destruction we receive are accurate.

Recommendations: Federal agencies operating in other nations should be required by NHPA to give reasonable consideration to historic properties through appropriate programs of identification and planning. The Council should be authorized to develop guidelines for such activities.

SECTION 10
PARTICIPATION BY INDIAN TRIBES
AND OTHER NATIVE AMERICANS

Introduction

Indian tribes and other Native American groups (e.g., Native Hawaiian organizations, Aleuts, Eskimo groups) have participated on an irregular basis in the national historic preservation program but have no formal role except as ascribed to them in various Interior and Council regulations. More formalized participation has been proposed by national Indian organizations and by the Bureau of Indian Affairs (BIA). In discussions with SHPO's, tribal representatives, and others, four questions have been asked about tribal/Native American participation, most of which have implications for changes in NHPA.

Question 1: Should the provisions of NHPA apply to tribal actions on Indian reservations? It has been proposed that, inasmuch as Indian tribes are sovereign entities, their actions on their reservations should not be subject to review under Section 106 and other aspects of NHPA. Currently, such actions do require review to the extent that they require approval by the BIA, as BIA approval is a Federal undertaking subject to review under Section 106.

Recommendations: The requirements of NHPA should continue to apply on reservations whenever an approval or other action by the BIA or another Federal agency is involved. They should not apply, as they do not now, to tribal government actions that require no approval by a Federal agency. Review of federally approved actions on a reservation is equivalent to review of a federally permitted activity within the jurisdiction of a local government and is necessary to ensure that the Federal agency involved takes the effects of the activity on historic properties into account.

Question 2: Should tribal historic preservation programs be allowed to substitute for the programs of SHPO's with respect to activities and properties on reservations? If so, should they receive grants-in-aid as the SHPO's do? Should they be expected to meet the same standards as SHPO's? Indian organizations and the BIA tend to answer "yes" on all three points. SHPO's and others are concerned about sharing the very small Historic Preservation Fund with large numbers of tribal governments and with the practical problems presented by interaction with reservation programs, particularly on small reservations.

Recommendations: There is no consensus within the Council on the question of whether tribal historic preservation programs should take the place of SHPO's. Although supportive of the idea in principle, we are concerned about its practical ramifications. Any system to provide for such assumption of duties would have to be extremely flexible to allow for the differences among tribes and regions and should not result in diminished funding for SHPO operations.

Question 3: Should Indian tribes and other Native American groups have any special role in historic preservation activities, such as review of

projects and nominations to the National Register which deal with properties that are not on reservations but that have traditional cultural importance to such tribes or groups? For example, what should be the role of the Creek Nation, now headquartered in Oklahoma, in the review of a Federal project affecting an ancestral Creek site in Georgia? There is a general perception that some sort of special role is appropriate, but there are obvious practical problems involved in implementation.

A specific aspect of this question that has recently attracted attention has to do with treatment of human skeletal remains exhumed during archeological excavations. American Indian organizations have insisted that these remains be reburied. Some archeologists object, saying that the needs of scientific research demand that such remains be retained in research laboratories for future study. NHPA does not address this issue, but the Archeological Resources Protection Act of 1979 defines human remains as scientific specimens that must be retained in curatorial facilities.²³

Recommendations: We believe that flexibility must be maintained with respect to tribal participation and participation by other Native American groups in historic preservation activities outside the boundaries of reservations. Since the primary context in which such participation would be likely to occur would be with respect to Section 106 review, we feel that this matter can largely be handled through the use of regulations and guidance issued by the Council, without changing NHPA itself. To address the reburial of human remains, however, a change in the Archeological Resources Protection Act might be necessary. While the Council has not reached consensus on the question of reburial, it appears clear that the law should permit enough flexibility to allow reburial to occur when cultural and religious interests in human remains outweigh their scientific research value.

Question 4: Should Indian tribes and other Native American groups be represented in the historic preservation program solely by their elected or governmentally appointed officials, or also by people ascribed authority by their traditional cultural systems? One line of argument holds that since tribes are sovereign nations, the U.S. Government must deal solely with their elected officials and their designees. The other line of argument holds that since tribal governments are essentially the creation of the U.S. Government, interacting only with them means in effect that the Government would be interacting only with itself. In addition, tribal councils are often considered insensitive to the cultural and preservation concerns of tribal members.

Recommendations: We believe that a clear distinction should be made between the activities of tribal governments and those of tribal members exercising their right as concerned members of the public to participate in historic preservation activities. Government-to-government relationships between the U.S. Government and the tribal governments should be just that, unencumbered by requirements to deal with traditional cultural authorities. However, in providing for public participation in historic preservation activities, particularly in review under Section 106 and related

authorities, Federal agencies and SHPO's should give special consideration to the views of traditional cultural authorities when culturally important properties may be involved. We believe that provision for such consideration can be made through Council regulations and guidance, without changes to NHPA.

Question 5: Should Indian tribes and other Native American groups be represented on the Council? It has been suggested that the Council would be better able to address issues involving Indian tribes and Native American interests if a representative of their interests were added to the Council.

Recommendation: We believe that an amendment to NHPA should be considered to add a Native American representative to the Council.

SECTION 11
PUBLIC OUTREACH, EDUCATION, AND VOLUNTEERISM

Introduction

Historic preservation is justified by the premise that it serves the public, and the preservation movement's origins lie in grassroots efforts to save locally significant buildings and sites. Although the field has become professionalized, particularly since passage of NHPA, public involvement in the national program continues to be vital, and it is widely felt that greater efforts are needed to encourage such involvement and to inform the interested public.

A related concern has to do with participation by a range of professions and academic disciplines. Since professionalization of the field began, particularly during the 1960's, historic preservation has been essentially the province of the architectural historian and the archeologist, with significant but less systematic participation by historians and architects. In recent years, a variety of other practitioners has begun to become involved: landscape architects, engineers, anthropologists, and sociologists, to name a few. At the same time, academic degree programs in historic preservation (usually with a strong architectural and planning emphasis) and cultural resource management (always with a strong archeological emphasis) have begun to appear in colleges and universities around the country. Increased participation by diverse professional interests and increased specific attention in the academic environment to preservation-related topics are widely seen as desirable, but questions sometimes arise as to how new perspectives should be incorporated into the practice of historic preservation.

Question 1: Should the national historic preservation program give greater emphasis to involving the public, and should NHPA be amended to encourage such involvement? Public participation in Federal, State, and local decisionmaking about preservation matters was discussed in Section 1. The question addressed here is whether efforts should be made to ensure that activities carried out under the authority of NHPA are open to the public and take full advantage of public interest in preservation. Several mechanisms could be used to encourage public involvement, such as:

- o Establishing public education and involvement as a specific responsibility of State Historic Preservation Officers;
- o Establishing such activities as the specific responsibility of Certified Local Governments; and
- o Including specific incentives for preservation activities by private individuals and organizations, perhaps along the lines of the urban homesteading programs carried out by HUD and a number of cities or the acquisition and preservation work of the Archeological Conservancy in New Mexico.

Recommendations: In general, we believe that public involvement occurs most fruitfully at the local level. Accordingly, it would appear desirable to encourage Certified Local Governments to give high priority to programs

of public outreach. This in turn suggests that State Historic Preservation Officers, who certify local programs, should be given similar encouragement. This may require legislation to clarify the activities authorized under NHPA. As currently interpreted by NPS, public education and outreach are allowable activities using Historic Preservation Fund appropriations, but only when directly related to such program purposes as the nomination of properties to the National Register.

Question 2: Should the public, and specifically volunteers, be more systematically involved in Federal agency historic preservation programs?

The Department of the Interior's "Take Pride in America" campaign to increase citizen awareness of and participation in the management of public lands is one example of an effort to involve the public in a positive manner; the National Park Service's "Volunteers in Parks" is another. Other examples are available from individual States, other nations, and the private sector. The Arkansas Archeological Survey, for example, gives high-level training to avocational archeologists and formally certifies them for participation in survey activities. Archeological preservation programs in Canada and Australia train and designate volunteer "archeological wardens" to assist in identifying and protecting archeological sites. Private organizations such as Earthwatch have pioneered the concept of "participant/contributor"-based research programs in the natural and social sciences, in which volunteers on organized projects pay their own way plus, in the aggregate, the costs of the project as a whole. Integration of such programs into Federal agency historic preservation activities could increase knowledgeable public participation and result in at least minor financial savings for agencies.

Federal agencies are not always enthusiastic about participation by volunteers. Many question whether involving volunteers can really save money, since their participation may require substantial supervision and organization. Some are concerned about endangering project timetables or about liability. A particularly delicate concern with respect to volunteer participation in archeological preservation projects is that volunteers may feel entitled to a share of the artifacts recovered. There is a longstanding conflict between citizen artifact collectors and professional archeologists on this point; if it could be resolved, an important source of volunteer assistance both in excavation and in management might be developed, while reducing the incentive to collect artifacts destructively and illegally.

Recommendations: This question requires further study. We do not recommend statutory changes to address this subject at this time, but believe that, subject to the availability of time and funds, the Council should explore this topic further in consultation with appropriate program agencies, State and local governments, and private sector interests.

Question 3: Should the Federal Government encourage historic preservation and the integration of preservation concepts into educational programs?

Such education can take place at all levels. A number of local and State governments have excellent programs introducing historic preservation topics into curriculum at the elementary and secondary levels, while the number of historic preservation and cultural resource management courses taught in colleges and universities is increasing steadily. Grants-in-aid

to the States are presently used to support some of these activities, to the extent they are related directly to the responsibilities of the State Historic Preservation Officers. The question is, should the Federal Government do more?

Recommendations: We believe that an effort would be appropriate at the Federal level to help improve communication and coordination among individuals and institutions interested in preservation education at all levels. Such an effort could have substantial positive impact on the quality of preservation work done on behalf of the Federal Government, as well as on public participation in preservation. No Federal agency is charged with carrying out such an effort today. It would appear to be an appropriate Council function, but it is not among the Council's specific authorities as detailed in NHPA, and neither funds nor staff are available to carry it out.

Question 4: Should special efforts be made to involve specific professions and other particular interest groups, for example, ethnic groups, unions, practitioners of such professions as civil engineering and landscape architecture, and local and national civic organizations? The involvement of new professions and of groups with different perspectives on preservation issues can bring vitality to the program and help guarantee that America's full diversity is represented. The Department of the Interior's policy is to welcome and encourage participation by a diversity of professions and other interests in the national historic preservation program. Some Council members, however, believe that this policy is not widely understood or fully shared by other involved agencies, so that more definite outreach efforts are needed to encourage such involvement.

Recommendations: We do not believe that statutory changes are needed to address the participation of diverse professional and other constituencies in preservation. The Council and the Federal Government in general, however, should join the Department of the Interior in encouraging such preservation, and should give further consideration to the need for specific programs of outreach.

REFERENCES

1. 16 U.S.C. 470 et seq.
2. 16 U.S.C. 469a-2.
3. See Cultural Conservation, Department of the Interior and American Folklife Center, 1983.
4. 36 CFR Part 800, revised (published September 2, 1986, at 51 FR 31115).
5. 36 CFR Part 800, revised (published September 2, 1986, at 51 FR 31115).
6. National Park Service: "Guidelines for Historic and Archeological Resource Management; Federal Agency Responsibilities Under Section 110 of the National Historic Preservation Act." Published for comment March 10, 1986, 51 FR 8245-55.
7. 36 CFR Part 800, revised (published September 2, 1986, at 51 FR 31115).
8. Figures provided by the National Trust for Historic Preservation.
9. Federal Tax Law and Historic Preservation. Report to the President and Congress, Advisory Council on Historic Preservation, 1983.
10. An extrapolation from the third quarter of FY 1985, the most active quarter on record.
11. Preliminary Report of Task Force on Federalism and Preservation. Advisory Council on Historic Preservation, December 15, 1981.
12. 43 U.S.C. 338; funds may also be derived from revenues payable under 30 U.S.C. 191.
13. 16 U.S.C. 461-467.
14. 16 U.S.C. 469.
15. 49 U.S.C. 303.
16. 42 U.S.C. 1437.
17. 16 U.S.C. 470ii.
18. 16 U.S.C. 1908.
19. 16 U.S.C. 431-433.

20. Talmadge, Valerie, "A Consolidated National Council on Historic Preservation." ms., Legislation Committee, National Conference of State Historic Preservation Officers, 1986.

21. For example, the International Centre for the Study of the Preservation and the Restoration of Cultural Property (ICCROM) and the International Council on Monuments and Sites (ICOMOS).

22. P.L. 97-446.

APPENDIX 1
MEMBERS OF THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

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