



ADVISORY COUNCIL ON HISTORIC PRESERVATION

Federal Historic Preservation Case Law Update 1996-2000

Supplement to *Federal Historic Preservation Case Law:
Thirty Years of the National Historic Preservation Act*

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ADVISORY COUNCIL ON HISTORIC PRESERVATION

Mission statement: To promote the preservation, enhancement, and productive use of our Nation's historic resources, and advise the President and Congress on national historic preservation policy.

An independent Federal agency, ACHP promotes historic preservation nationally by providing a forum for influencing Federal activities, programs and policies that impact historic properties, advising the President and Congress, advocating preservation policy, improving Federal preservation programs, protecting historic properties, and educating stakeholders and the public.

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***Fein v. Peltier*, 949 F. Supp. 374 (D.C. V.I. 1996).**

Plaintiff, Fein, sought a preliminary and permanent injunction barring defendant, a National Park Service (NPS) Superintendent, from interfering with a residential construction. Plaintiff was assigned a property right in 1991 stemming from a 1975 deed conveying the property in question to the United States as part of approximately 94 acres to be included in the Virgin Islands National Park. The deed conveyed the land subject to a right of use and occupancy reserved by the grantors for a period of 60 years, which was assigned to plaintiff. This right included the right to construct a single family dwelling so long as it did not interfere with the historic ruins within the area, and also required the grantor to cooperate with NPS.

In 1994, Fein applied through the Department of Planning and Natural Resources (DPNR) for a minor Coastal Zone Management permit to build a residence. NPS never received formal notice, but found out and put DPNR on notice of its interest in project, warned of the project's possible impact on historic ruins on the land, and protested that the architectural plans did not conform to the restrictions on the mentioned deed. Although no evidence was presented that DPNR ever directly responded to NPS, Fein was required to adjust the plans to meet certain standards. The plans were revised and approved by DPNR and the permit was issued. An adjoining landowner who had not received proper notice successfully appealed to the Virgin Islands Board of Land Use Appeals, the initial permit was voided, and the permitting process started anew.

This time, NPS received an official notice from DPNR of Fein's renewed application. NPS responded with a letter advising it of the potential impact on historic properties and the need to comply with the National Historic Preservation Act (NHPA) and the Section 106 process. DPNR did not respond to the letter, and issued the permit before NPS could complete the Section 106 compliance procedures. The commissioner of DPNR then informed NPS that the permit was granted because Section 106 did not apply since the construction of the dwelling was not a Federal undertaking.

When Fein's contractor began site preparation, NPS officers entered the construction site and ordered the contractors to cease all site preparations or risk going to jail. Plaintiff brought this lawsuit seeking equitable relief, including a temporary restraining order (TRO). The TRO was granted on condition that no historic ruins would be disturbed. At the hearing

for the permanent and preliminary injunction, it was revealed that the contractor had disturbed some of the ruins by moving a historic stone wall.

The court ruled from the bench that a permanent and preliminary injunction would not be granted and the matter would be dismissed for lack of subject matter jurisdiction. The issue of jurisdiction turns on whether NHPA and the Archeological Resources Protection Act are applicable. The court found that they were applicable and that plaintiff had not exhausted all administrative remedies available to him. The court concluded that Section 106 compliance procedures applied to plaintiff for two reasons: 1) NPS is required to manage and maintain property it owns to preserve historic, archeological, architectural, and cultural values in compliance with Section 106 under Section 110(a) of NHPA, and 2) NPS is required by Section 106 itself to take into account the effect plaintiff's undertaking will have on a site listed on the National Register, on which the property in question is located.

In reaching this conclusion, the court found that this was an undertaking for purposes of Section 106, and construed the definition of undertaking to include any project or activity under the direct or indirect jurisdiction of NPS that requires its prior approval, regardless of whether the project or activity is funded in whole or in part by the Federal Government. Thus, plaintiff must exhaust all administrative remedies before seeking relief from the court.

In addition, the court ruled that even if it had proper jurisdiction, plaintiff would not have been entitled to equitable relief because he had not come to the court with clean hands. By violating the restrictions on the temporary restraining order that this court issued, the plaintiff was seeking equitable relief with unclean hands, violating a long-established rule of equity.

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***Knowles v. United States Coast Guard*, 1997 WL 151397 (S.D.N.Y. 1997).**

This case arose out of the U.S. Coast Guard's decision to close its Support Center on Governors Island, New York. Plaintiffs, Knowles et al., alleged that defendants, the Coast Guard, failed to comply with the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), Freedom of Information Act, and other Federal ethics laws and regulations. Plaintiffs sought a preliminary injunction to prevent the Coast Guard from executing its plan to discontinue all of its operations on Governors Island.

Following a decision in 1996 denying the preliminary injunction, both plaintiffs and defendants filed cross motions for summary judgment. Among the important issues raised in this case were segmentation, the integration of an agency's NEPA and NHPA obligations, and the use of an independent contractor to prepare NEPA documentation.

Plaintiffs claimed that the Coast Guard improperly "segmented" its environmental review process in order to avoid NEPA's requirement of preparing an Environmental Impact Statement because they saw it as a foreseeable event that the Coast Guard would "dispose" of the property after the Support Center was closed. Therefore, they argued, the actions of disposal and closure were interdependent. The court stated that "only when a given project effectively commits decision makers to a future course of action will this form of linkage argue strongly for joint environmental evaluation." Based on the evidence presented, the district court found that the closure of the Support Center did not commit the property either to disposal or to the sale and re-development anticipated by plaintiffs. In view of these circumstances, the court determined that the Coast Guard did not segment the project in order to circumvent any provisions of NEPA.

Plaintiffs further claimed that the Coast Guard violated NEPA and NHPA not only by failing to perform the review processes concurrently, but also by signing the Finding of No Significant Impact (FONSI) prior to concluding NHPA Section 106 review process. Additionally, plaintiffs complained that there was no public participation in the development of the Programmatic Agreement (PA) under Section 106 addressing the effects of the closure action. The Council on Environmental Quality's (CEQ) regulations call for the integration of the NEPA requirements "with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively." The court also noted that NHPA's implementing regulations contemplate that NEPA and NHPA review should be integrated closely, but both the Section 106 and CEQ regulations allow for phased compliance and implementation of reviews in a flexible manner. The record showed that the Coast Guard had initiated Section 106 review at the outset of the NEPA process and had negotiated with various parties to finalize a PA and formulate caretaker provisions before issuing the FONSI. It also indicated that individuals, organizations, and local authorities participated in the NEPA process.

In summary, the court concluded that the Coast Guard was not required to complete the Section 106 process before issuing the FONSI, and to the extent that plaintiffs complained about the level of public

participation in the PA, the court stated that this agreement is not an "environmental document" subject to the public notice provisions of 40 C.F.R. Section 1506(b).

Plaintiffs also questioned the Coast Guard's use of non-agency personnel, independent contractors, to prepare the environmental studies, and asserted that this violated NEPA. The court dismissed this contention, stating that a Government agency is permitted to use outside consultants to prepare environmental documents provided that the agency independently reviews and verifies the underlying data.

After reviewing plaintiffs' multiple arguments, the court found that they had failed to demonstrate the existence of any material issue of disputed fact, and, dismissing the complaint, awarded summary judgment in favor of the Coast Guard.

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Apache Survival Coalition v. United States, (Apache Survival II), 118 F.3d 663 (9th Cir. 1997).

Plaintiff, Apache Survival Coalition, sought to enjoin construction of the Mount Graham International Observatory, arguing that defendant, the U.S. Forest Service, failed to comply with the National Historic Preservation Act (NHPA). Up until this point, there had been an injunction in place from a suit brought by another group, Red Squirrel V, that sought the same injunction, but it had recently expired and construction was underway again.

As in *Apache Survival I* (see Case 125), the district court decided this case on the doctrine of laches. The court emphasized that the Coalition did not come forward with its claim at the same time Red Squirrel V sought its injunction, and instead waited two years until that injunction was dissolved. The court thought this especially inexcusable in light of the "strong wake-up call" of *Apache Survival I*, and it denied the injunction.

In affirming the denial, the Ninth Circuit found the Coalition's argument that it had been attempting to use other routes of resolution (i.e. "administrative strategy") unconvincing. If the Coalition did in fact pursue its claims through an administrative strategy, mainly lobbying, there was little evidence of its efforts in the record. The court stated that the Coalition's tactical decisions were remarkably similar to that used in *Apache Survival I*. The tactic in those cases was to wait to bring suit until the challenges launched by other parties had failed. Further, the Coalition failed to

explain how the three telescopes in their present configuration represent any greater desecration than they would have in their original, already approved, configuration.

The court remanded the case to the trial court and stated that if there is no additional or different proof, it is likely that the district court will find in favor of the Government. It did, however, state that nothing in this opinion is meant to discourage the Coalition from seeking the placement of Mount Graham on the National Register of Historic Places, which would alleviate many of the problems of outdated information and inadequate consultation presented here.

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***Sierra Club v. Slater*, 120 F.3d. 623 (6th Cir. 1997).**

The Sierra Club, along with other plaintiffs, sought to enjoin the construction of an urban corridor development project known as the Buckeye Basin Greenbelt Project in Toledo, Ohio, and claimed a variety of environmental violations in a suit against multiple Federal, State, and municipal defendants. In this order, the court ruled on plaintiffs' appeal of the district court's grant of summary judgment to defendants on all parts of the complaint. The district court dismissed Counts I, IV, and V in full, and Counts III and VIII in part, under the six-year statute of limitations on all suits against the United States. The appellate court confirmed this ruling.

Of importance here is plaintiffs' claim that the Army Corps of Engineers (Corps) improperly failed to give the Advisory Council on Historic Preservation (Council) an opportunity to review and comment on its conclusion of "no adverse effect" on historic properties. In response, defendants pointed out that the district court found that the Federal Highway Administration (FHWA) submitted its own "no adverse effect" findings to the Council, and that those findings were identical to the Corps' findings. Although plaintiffs conceded that the findings of the two entities "may have been similar," they maintained that FHWA's record "was not at all similar to the record that would have been submitted by the Corps" if the Corps had complied with its obligation to compile and submit a record.

Further, plaintiffs did not dispute that the Council was fully apprised of the FHWA findings regarding historic properties; that the FHWA findings were identical to those of the Corps; and that the Council concurred in the "no adverse effect" finding.

After reviewing both NHPA requirements and the internal regulations of the Corps, the court stated that the regulations of the Corps made clear, as defendants argued, that they were entitled to rely on the lead agency—here, FHWA—in complying with NHPA. 16 U.S.C. Section 470f; 33 C.F.R. pt. 325, app. C2(c). The court concluded that plaintiffs had failed to articulate any recognizable error on this issue.

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

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

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

The court also stated that the executed MOA could not be used to establish jurisdiction because previous courts had found that such memoranda "have no binding effect on the parties unless there exists a 'Federal undertaking,'" and the "obligation itself assumed by the city in the MOA is not sufficient to satisfy the threshold requirement of an 'undertaking.'" 1998 WL 340445, 2.

The court then looked at the issue of irreparable harm in its decision to deny the injunction. While the court acknowledged that AIA would suffer great injury if injunctive relief was not granted, it nonetheless concluded that "the hardship to the city outweighed any hardship visited upon the plaintiffs." *Id.* Finally, the court stated that the public interest lay in favor of the decision to demolish since such a

decision had been supported by the city's representatives.

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***Tyler v. Cisneros*, 136 F.3d 603 (9th Cir. 1998).**

Plaintiffs, Tyler et al., sought to enjoin the City of San Francisco from building a low-income housing project next to their homes, which were eligible to be listed in the National Register of Historic Places. The project was to be constructed with Federal funds. Plaintiffs argued that the U.S. Department of Housing and Urban Development (HUD) and the other listed defendants failed to meet the terms of their own Memorandum of Agreement (MOA), which was designed to mitigate the project's impact on plaintiffs' homes. Plaintiffs sought a preliminary injunction under the National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA).

The district court denied the preliminary injunction and granted defendants' motion to dismiss. The court ruled that plaintiffs' NHPA claims were moot because NHPA contains an implicit statute of limitations, which barred assertion of NHPA claims once the Federal agency (HUD) released the funds to the city. In holding this, the court relied on 36 C.F.R. Section 800.3(c), which states in part, "Section 106 requires the Agency Official to complete the Section 106 process prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license or permit."

The court went on to rule that even if there was no implicit statute of limitations in NHPA, plaintiffs' claims would fail because HUD no longer exercised "continuing authority" over the funds. The court used a similar analysis under NEPA because HUD had "ceased to exercise continuing authority over the project once it disbursed the funds."

In reversing, the Ninth circuit court of Appeals stated that there was no implicit statute of limitations in NHPA. Rather, a more common sense reading of Section 106 would suggest that the "prior to" language the district court relied on merely refers to the timing of agency compliance. See 36 C.F.R. Section 800.3(c). In other words, this language establishes a time during which the agency is required to conduct an NHPA review, not the time during which a plaintiff is required to bring a lawsuit. Indeed, construing the language as the district court did runs counter to the implied private right of action to file claims under NHPA, effectively leaving no time slot open for a plaintiff to file suit.

Furthermore, the court stated that it has never held that an implicit statute of limitations bars

plaintiffs from bringing suit under NHPA once funds are released. Rather, the court has applied the laches doctrine to resolve the timeliness of both NHPA and NEPA claims.

The appellate court also found the continuing authority aspect of the district court's decision to be erroneous since the plain language of NEPA and NHPA regulations states that the Federal agency may have some continuing authority because it is a party to the agreement.

Further, the appellate court overruled the district court's decision that the city's Federal environmental review responsibilities ceased once Federal involvement in the project ceased. The statute authorizing delegation of HUD's NHPA and NEPA review responsibilities provides that the local official "consents to assume the status of a responsible Federal official under [NEPA and other Federal laws] and...consents...to accept the jurisdiction of the Federal courts for the purpose of enforcement of his responsibilities as such an official." 42 U.S.C. 12838(c)(4). This means that the city, as a signatory to the MOA, remains liable under NHPA and NEPA for its failure to carry out the terms of the MOA.

This case was remanded to the district court to first address the standing issue and then, if it is found that plaintiffs have standing, to decide the extent of HUD's and the city's obligations to plaintiffs under the MOA and whether these obligations were breached.

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***Brewery Dist. Soc. v. Federal Highway Admin.*, 996 F.Supp. 750 (S.D. Ohio 1998).**

In a second opinion regarding the historic Ohio State penitentiary, the same district court that ruled against a temporary restraining order in *American Institute of Architects v. City of Columbus*, 1998 WL 340445 (S.D. Ohio 1998), ruled that a lawsuit could proceed against the Federal Highway Administration (FHWA), under the "anticipatory demolition" provision of Section 110(k) of the National Historic Preservation Act (NHPA).

The court ruled to deny FHWA's motion to dismiss, thus allowing the suit to proceed by determining that plaintiff, Brewery District Society, had standing to sue, that NHPA conferred a private right of action, and that plaintiff had not violated Fed. R. Civ. P. 19(a) by failing to join the City of Columbus as a necessary party.

The lawsuit sought to prohibit both FHWA and the Environmental Protection Agency (EPA) from

providing any type of funding or assistance to the City of Columbus in connection with the downtown arena project, including the demolition of the penitentiary until such agencies consulted with the Advisory Council on Historic Preservation (Council).

Specifically, plaintiff argued that the demolition of the historic penitentiary constituted “anticipatory demolition” under Section 110(k) of NHPA. Section 110(k) was adopted in 1992 to discourage “anticipatory demolition” by prohibiting Federal agencies from providing grants, loans, permits, or other assistance to any applicant who intentionally destroys a historic property in order to avoid compliance with Section 106 of NHPA, unless the agency consulted with the Council to determine whether such assistance was nevertheless justified.

The court allowed the case to proceed against defendant, FHWA. It dismissed the suit against EPA, on the grounds that the complaint’s allegations against EPA were “too hypothetical and conjectural to meet the Article III standing requirements.” Plaintiff had only alleged that EPA “may be asked to provide assistance” to the city. The court believed that plaintiff needed to show a more immediate threat of harm than merely alleging that some Federal agency may be asked at some point in the future to provide assistance.

The claims against FHWA were allowed to remain based on the allegations of FHWA’s current or imminent involvement in joint planning with the city, which would result in “assistance” relating to the penitentiary site.

The court also ruled that NHPA provides a private right of action outside of the Administrative Procedure Act, under Section 305 of NHPA. The court referenced that two cases did exist that stated otherwise, but that the greater weight of authority held for the existence of such a right of action under Section 305.

The last argument addressed by the court was whether the case should be dismissed for failure to join the City of Columbus as a necessary party under Fed. R. Civ. P. 19(a). While the court acknowledged that “the Federal agency defendants do not have the power to prevent the City from destroying the remaining buildings on the pen site,” the court stated, “that fact alone does not render the city a necessary party under Rule 19.”

The court explained that it can “provide plaintiffs the relief they request: to enjoin FHWA from providing assistance which is prohibited under Section 470h-2(k), and can declare the rights, duties and responsibilities of the remaining parties in the litigation.”

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USS Cabot CVL 28 Assn., Inc. v. Josiah, 1998 WL 315387 (E.D. La. 1998), Docket No. CIV. A. 98-0154.

Plaintiff, USS *Cabot* CVL 28 Association, Inc., an association of primarily U.S. Navy veterans who served on the USS *Cabot*, sought a preliminary injunction 1) ordering the Commander of the Eighth Coast Guard District to require that a Dead Ship Tow Plan be submitted to plaintiff prior to any movement of the ex-Navy aircraft carrier USS *Cabot*, a National Historic Landmark, and 2) prohibiting the Commander from approving any Dead Ship Tow Plan for the *Cabot* unless and until he has complied with the provisions of the National Historic Preservation Act (NHPA).

Following its war days, the *Cabot* was transferred to Spain and then back to the U.S. to one of the defendants, the USS *Cabot*/Dedalo Foundation, Inc., a non-profit corporation, for the purposes of converting the vessel into a museum. The ship was docked in New Orleans and then moved to Violet, Louisiana. The ship was then transferred to another one of the defendants, Global Maritime Group, LLC. The foundation entered into an agreement with Global to scrap the *Cabot*. The *Cabot* was then moved to Port Isabel, Texas.

Plaintiff then filed this lawsuit because the Foundation/Global joint venture planned to move the *Cabot* from Port Isabel to Brownsville where it would be scrapped. Plaintiff made it clear that its interest was to prevent the scrapping of the *Cabot* and that it had no particular interest in any movement of the vessel, except to the extent it would result in the vessel’s demolition. Plaintiff contended that the approval of an additional Dead Ship Tow Plan by the U.S. Coast Guard, which has extensive regulatory authority, is an “undertaking” under NHPA.

The court found several serious questions in regards to the merits of plaintiff’s case. As a preliminary matter, the court stated that plaintiff had not shown that, under the circumstances, the regulations required the Coast Guard to control any further movement of the *Cabot*. Any decisions on further vessel movement were left to the discretion of the District Commander and the Commander of the Port (COTP). Further, plaintiff was unable to show that conditions mandating action by the COTP currently existed. There was also a serious question as to whether the movement of the *Cabot* from Port Isabel to Brownsville would constitute an “undertaking” under NHPA.

However, the court refused to rule on this issue and decided to deny the petition for a preliminary injunction on the issue of harm to the public interest. After assuming that plaintiff had demonstrated irreparable harm, the court concluded that the potential harm to plaintiff if the injunction did issue (i.e., moving the vessel and scrapping it) did not outweigh the potential hardship to Global and the foundation if the injunction were granted (i.e., losing the vessel through capsizing or sinking in a storm due to its present location).

The court further found that the issuance of the preliminary injunction would not be in the public interest. While acknowledging that there is a public interest in the preservation of National Historic Landmarks such as the *Cabot*, the court stated that the interest of public safety posed by the current location and size of the *Cabot* was more important. In its current location, the *Cabot* posed a threat to Port Isabel in the event of a tropical storm, exposing the community to a risk of loss of life and damage to facilities and the environment.

Since plaintiff could not show that the requested preliminary injunction would not undermine the public interest, it failed to establish another of the necessary prerequisites to the issuance of a preliminary injunction, and the court denied the request.

In order to be granted a preliminary injunction, the movant must demonstrate by a clear showing that 1) there is a substantial likelihood of success on the merits; 2) there is a substantial threat of irreparable harm if the injunction is not granted; 3) the threatened injury outweighs any harm that may result from the injunction to the non-movant; and 4) the injunction will not undermine the public interest. Bypassing the first issue, and assuming the second issue in favor of plaintiff, the court found against plaintiff regarding the third and fourth issues. The petition was, therefore, denied.

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***Friends of the Atglen-Susquehanna Trail, Inc. v. Pennsylvania Public Utility Comm'n*, 717 A.2d 581 (Pa. 1998).**

Plaintiff, Friends of the Atglen-Susquehanna Trail, Inc. (FAST), a rails-to-trails organization, requested judicial review of a decision by defendant, the Pennsylvania Public Utility Commission, that approved stipulations of a settlement that Conrail, a railroad company, entered into with local townships and the Department of Transportation (DOT) that

abolished rail-highway crossings along the former Enola Branch rail line and allowed the transfer of Conrail's property.

Plaintiff questioned whether the commission was preempted from ordering the demolition of historic bridges by the Interstate Commerce Commission's (ICC) and the Surface Transportation Board's (STB) orders; whether the commission had complied with the State History Code; whether the commission had erred by not including this case in a moratorium adopted pursuant to the governor's policy of bridge preservation; whether the commission complied with the Rails to Trails Act of December 18, 1990; and whether the commission's conclusion that certain bridges are near the end of their useful life is supported by substantial evidence. The commission challenged FAST's standing to appeal.

The court dismissed the commission's request to quash the petition for review based on FAST's lack of standing to appeal. In support of its position, the commission had asserted that FAST did not have an immediate or substantial interest, did not own the subject land or have a reasonable expectation of owning the land. The court found that FAST had standing under State preservation laws because it sought to enforce State and Federal laws and policies relating to historic preservation. Additionally, as a trails group, it had exerted substantial efforts to acquire and convert the rail line at issue.

The petitioners attempted to assert that the subject matter jurisdiction of the commission was preempted by orders of ICC and STB, and that the theory of "conflict preemption" which can apply where State law actually conflicts with Federal law to such a degree that it is impossible for a private party to comply with both, "or where State law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Friends*, 717 A.2d 581, 586. In this instance, FAST proposed that conflict preemption applied to divest the commission of jurisdiction until the Section 106 review process required by the National Historic Preservation Act (NHPA) was completed. The court held that the commission was not preempted from proceeding in the matter, and that its order was not in conflict with STB requirements because it required the applicant to complete Section 106 review in compliance with the order.

FAST's argument—that the commission erred by not including the case in the moratorium issued by the commission pursuant to the governor's policy of bridge preservation adopted shortly after the order in this case—was dismissed with a finding that the issue had not been properly presented and amounted to nothing more than a disagreement with a policy decision.

The court concluded its review by rejecting FAST's assertion that the commission's conclusion regarding the condition of the subject bridges, and the finding that they were near the end of their life span, was not supported by substantial evidence. On the other hand, after noting more than 350 factual findings made by the administrative law judge and reports by both the applicant and affected townships, the court found that there was substantial evidence to support the finding of fact, and affirmed the order of the commission.

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***Grand Canyon Air Tour Coalition v. Federal Aviation Administration*, 154 F.3d 455 (D.C. Cir. 1998).**

Plaintiff, the Hualapai Tribe, maintained that defendant, the Federal Aviation Administration (FAA), issued too soon Special Flight Rules regarding the reduction of aircraft noise from sightseeing tours in the vicinity of Grand Canyon National Park. The tribe asserted that when FAA was developing these rules, it failed to consider whether establishing expanded flight-free zones would push aircraft noise off the park and onto the Hualapai Reservation.

The tribe argued that the consequences of this decision would harm the tribe's traditional cultural properties, sacred sites, ongoing religious and cultural practices, natural resources, and economic development. It further alleged that FAA's failure to consider these possible consequences violated the National Historic Preservation Act, National Environmental Policy Act, Administrative Procedure Act, and the United States' trust obligations to the tribe.

The court held that the tribe's arguments were not ripe because the routes the air tours would take had not been determined, and the court could not assess whether or how much these routes would affect the reservation.

The tribe also contended that the Government had failed to consult with it on a government-to-government basis while developing the Final Rule, but reformulated this position in oral argument, conceding that there had been consultations but they were not meaningful. The court also postponed its review of this assertion, finding that FAA still had time to satisfy any consultative obligations before the final plan was implemented, and these claims would become ripe for the court's consideration.

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***Society Hill Towers Owners' Assn. v. Rendell*, 20 F. Supp. 2d 855 (E.D. Penn. 1998).**

Plaintiff, a group of residents of Philadelphia's Society Hill neighborhood, sought judicial review of a decision by the U.S. Department of Housing and Urban Development (HUD) to approve a \$10 million Urban Development Action Grant to the City of Philadelphia. This grant was to assist in funding the public portion of the development costs of a hotel and parking garage.

Plaintiff asserted that the city failed to comply with the applicable environmental statutes and regulations, conducted its procedural obligations out of sequence, and failed to take other nearby projects into account while assessing the project's cumulative impacts. Additionally, plaintiff claimed that the city and HUD failed to take into account the effects of this project on the historic structures and districts in the area as required by the National Historic Preservation Act (NHPA).

The court examined HUD's delegation of environmental and historic review responsibilities to the city under the authority of Title I of the Housing and Community Development Act of 1974. It also looked at the regulations promulgated by HUD for the agency to satisfy the requirements of the National Environmental Policy Act (NEPA) for grant recipients who assume HUD's NEPA responsibilities. It also reviewed the congressional record confirming that the delegation of authority extended to other acts that further the purposes of NEPA, including NHPA.

The court noted plaintiff's frustration at its inability to convince HUD to intervene in the review process. However, the court found that through the statutory delegation of responsibility, the city, not HUD, was responsible for compliance with the relevant statutes and regulations as well as responding to objections from the public, while HUD retained final authority for ensuring that the grant applicant adhered to the proper statutory and regulatory procedures.

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

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***Friends of the Astor, Inc. v. City of Reading*, 1998 WL 684374 (E.D. Pa., Sep. 17, 1998); No. Civ. A. 98-CV-4429.**

Plaintiff, Friends of the Astor, Inc., filed a complaint against defendant, the City of Reading, alleging that the attempted demolition of a historic Reading, Pennsylvania, theater, the Astor, violated the National Environmental Protection Act, National Historic Preservation Act (NHPA), and Community Development Grant Act of 1974. In this decision, the court denied plaintiff's motion for a preliminary injunction on the demolition, due to its finding that plaintiff had not demonstrated a likelihood of success on the merits.

The city was attempting to demolish the 1928 Astor theater in order to build a new convention center. The theater was placed on the National Register of Historic Places in 1978. It has, however, stood unused since the late 1970s, and although structurally sound, was in substandard condition.

In 1994, the city received funding from the State of Pennsylvania to match the Community Development Block Grant funds that the U.S. Department of Housing and Urban Development had agreed to provide for the rejuvenation of Reading's downtown business area. This rejuvenation included the construction of a convention center (the "Project") on the block where the Astor was located, which would result in the Astor's demolition.

In April 1998, after more than a year of negotiations, a Memorandum of Agreement (MOA) was executed between the city, the Advisory Council on Historic Preservation, and the Pennsylvania State Historic Preservation Officer (PASHPO) in order to satisfy Section 106 of NHPA. Stipulation II of the MOA stated that "The city shall not issue a demolition permit for the properties until confirmations of the financing commitments of the Project are received, with copies being forwarded to the PASHPO."

Friends of the Astor argued that the city failed to comply with the requirements of NHPA by violating this stipulation of the MOA. Plaintiff stated that although a financing commitment had been received, it was subject to a number of conditions. Plaintiff then argued that the intention of the parties was to create a meaningful condition to the demolition, and that a commitment subject to conditions was meaningless. The court refused to consider the intent argument, stating that "the city's obligations cannot be read to extend any further than what is expressly stated in the MOA." Since the stipulation at issue only required financing commitments, without qualifications, a

conditional commitment was enough to comply with the stipulation.

After reviewing plaintiff's arguments on the other alleged violations, the court concluded that there was no likelihood of success on the merits and denied the preliminary injunction. Among other things, the court stated that the fact that a property is listed in the National Register does not alone require the preparation of an Environmental Impact Statement under NEPA, when the property's demolition is proposed.

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***Presidio Golf Club v. National Park Service*, 155 F.3d 1153 (9th Cir. 1998).**

Plaintiff, the private Presidio Golf Club in San Francisco, California, challenged a proposal by defendant, the National Park Service (NPS), to construct a public golf clubhouse near its century-old private clubhouse, which was eligible for listing in the National Register. Presidio asserted that NPS violated the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) by failing to consider that constructing the public clubhouse might lead to neglect and destruction of the historic private facility. NPS then challenged plaintiff's standing to sue under NEPA, NHPA, and the Administrative Procedures Act, and filed for summary judgment.

NPS argued that plaintiff lacked standing for the following reasons: first, that any future injury to Presidio would be a purely speculative economic competitive injury that is not within the zone of interests to be protected by NEPA or NHPA; second, that Presidio lacked standing in its representative capacity based on injury to its club members; and third, that any future injury would be "self-induced," "conjectural and speculative," and not fairly traceable to the actions of defendant. The court found that purely economic interests do not fall within the "zone of interests" to be protected by NEPA or NHPA, noting that on previous occasions it has held that a court would have to find that plaintiff's interests are inconsistent with the purposes of NEPA, and the interests are so inconsistent that it would be unreasonable to assume that Congress intended to allow the suit. It further noted that the "zone of interests" test is not demanding.

After reviewing the facts, the court concluded that retention of the historic clubhouse was consistent with the purposes of NHPA as a "living part of...community life," and that it furthered NHPA's

goals to “encourage the...private preservation and utilization of...the Nation’s historically built environment.” The court found no need to require the participation of individual members in the suit as suggested by NPS, since the interests and claims are undifferentiated among the members and similar to the interests and claims of Presidio. Finally, determining that the projected membership losses could well prove fatal to Presidio and constitute a future injury that is fairly traceable to NPS’s alleged procedural violation, the court held that plaintiff had standing.

The court then turned to plaintiff’s allegations that NPS violated NEPA and NHPA, noting the guidance from previous case law stating that “an agency’s decision should be overturned if it was ‘arbitrary, capricious and abuse of discretion, or otherwise not in accordance with the law.’” *Western Radio Services Co. v. Epsy*, 79 F.3d 896, 900 (9th Cir.), cert. denied, 117 S.Ct. 80 (1996). It also stated that “review under the arbitrary and capricious standard is narrow and the reviewing court may not substitute its judgment for that of the agency.” *Id.*

Although NPS expressed confidence throughout the NEPA process that compliance would end with the preparation and approval of a Finding of No Significant Impact, the court found that the agency’s approach to the process was not pre-decisional and was therefore permissible. It also determined that it was neither arbitrary nor capricious for NPS to not take a “fuller account of the remote environmental effects on the historic private clubhouse that might result from the economic impact of competition from the new public clubhouse.”

Presidio argued that NPS erred during its NHPA review by failing to consider the golf club as an “interested party” and consulting with it. The court found that all that NPS had to do regarding interested parties during effect assessment was to “consider their views.” The court, based on NPS responses to public comments, decided that NPS had indeed considered Presidio’s comments. The fact that NPS disagreed with those comments did not present a compliance problem. Although Section 106 of NHPA requires agencies to “consult with...interested persons” as to the resolution of adverse effects, such consultation was unnecessary in this case due to NPS’s determination of no adverse effect.

The court ended its decision by holding that the district court did not err when it considered a “litigation affidavit.” The affidavit was prepared to explain NPS’s prior analyses of the possibility of using the private clubhouse, and also pointed out the standard developed by the Ninth Circuit in a previous case, which permits an “explanation” of agency

decision making to allow for an adequate judicial review.

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***Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569 (9th Cir. 1998).**

Plaintiff, the Morongo Band of Mission Indians, petitioned for a review of the decision by defendant, the Federal Aviation Administration (FAA), to implement the Los Angeles International Airport East Arrival Enhancement Project, and raised claims under the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), Section 4(f) of the Transportation Act, and various FAA regulations.

The court first stated that agency decisions under NHPA and Section 4(f) were to be reviewed under the arbitrary and capricious standard.

The court then dealt with the argument made by the tribe that the court must apply the “usual canon of construction that a statute designed to benefit Indians must be liberally construed in favor of the Indian beneficiaries,” citing *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994). The court stated that, although the United States owes a general trust responsibility to Indian tribes, unless there is a specific duty placed on the Government with respect to Indians, the responsibility is discharged by the agency’s compliance with general regulations and statutes not specifically aimed at Indian tribes. The court believed that the statutes at issue in this case were not designed to benefit Indian tribes.

Among other things, the tribe also claimed that FAA violated NHPA when it did not prepare an Environmental Impact Statement (EIS) as required by NEPA and FAA Order 1050. The FAA order requires the preparation of an EIS when agency action has an effect that is “not minimal” on properties protected by NHPA. The court noted that FAA stated in the Environmental Assessment (EA) that the only change that would result from the project would be an increase in “high altitude aircraft overflights.” The assessment also stated FAA’s conclusion that the project would cause no adverse impacts and that any surrounding historic resources would be unaffected by any of the alternatives. The court reasoned that because the effect would be minimal, an EIS was not required pursuant to FAA Order 1050.

The tribe also argued that FAA had not made a reasonable and good faith effort under Section 106 of

NHPA to identify all properties eligible for the National Register of Historic Places because it failed to follow up on information that indicated the existence of such properties. The court distinguished this case from *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995), finding that “FAA’s conclusion was not based on a finding of no cultural properties in the area, but on the fact that the noise and other studies showed that there would be no impact on any type of property in the project area” (emphasis added). Accordingly, the court decided that the failure to identify specific potential sites or properties is irrelevant.

The tribe further argued that NHPA required FAA to obtain the tribe’s consent prior to implementing the project. It cited Section 106 of NHPA, which states: “The Agency Official shall invite the State Historic Preservation Officer, and the Council should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties. When an undertaking will affect Indian lands, the Agency Official shall invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement.” 36 CFR Section 800.1(c)(2)(iii). The court found that consent from the tribe was not necessary in a case such as this, where the effect on cultural properties was insignificant or minimal.

The court concluded its review with an analysis under Section 4(f) of the Transportation Act, finding that it did not apply here since the increased high-altitude air traffic would have an insignificant effect on the “use” of the land.

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***Davis v. Latschar*, 1998 WL 968474 (D.D.C. Dec. 31, 1998), Docket No. CIV.A. 97-0232 PLF.**

The National Park Service (NPS) sought to reinstate its deer management program at Gettysburg National Military Park and Eisenhower National Historic Site. The program, in effect during 1996 and 1997, called for park rangers to shoot deer in a controlled harvest to maintain population density. NPS suspended the program in July 1997 because of this lawsuit, and stipulated that it would not reinstate the program without an order from the court. This case involves their request for such an order.

Plaintiffs, *Davis et al.*, argued that the court should enjoin the deer management program because defendant, NPS, had acted contrary to the NPS

Organic Act, its own management policies implementing that act, the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA). After finding that NPS had acted consistently with the Organic Act and its implementing guidelines, and that it had complied with the procedures of both NEPA and NHPA, the court granted summary judgment for NPS, permitting it to reinstate its deer management program.

After this suit was initiated, NPS moved to stay the litigation, arguing that it would eliminate the issues in the lawsuit by suspending the program while revisiting its compliance with the applicable laws. NPS also revealed that it had already initiated procedures to comply with NHPA requirements. NPS argued in the summary judgment motion that it had completed what it believed to be a sufficient NHPA process. It first concluded that the program would have “no adverse effects.” It then sought the concurrence of the State Historic Preservation Officer (SHPO), who agreed that there would be “no adverse effects.” It used the same process to seek the approval of the Advisory Council on Historic Preservation (Council), who also agreed.

Although plaintiffs did not argue that NPS failed to comply with Section 106 requirements, they asserted that NPS violated the Administrative Procedure Act (APA) by making an arbitrary and capricious decision of “no adverse effect” without considering a “relevant factor.” Plaintiffs’ primary argument was that the deer management program’s effect on Gettysburg’s “quiet contemplative atmosphere” (the “relevant factor”) was an adverse effect under Section 106, and was not considered by the reviewing parties. The argument was based on an excerpt from a National Register of Historic Places publication, *Bulletin No. 40*.

However, after reviewing the record, the court concluded that the argument was considered by all parties involved. It did state that although the SHPO and the Council did not use those exact words, they did consider that contention through a recharacterization of the argument. The court found that this recharacterization, coupled with the reviewers’ concurrence with NPS’s finding of “no adverse effect” on Gettysburg’s setting, feeling, or association, suggested that the SHPO and the Council fully considered plaintiffs’ submissions, and ruled that NPS had complied with the requirements of APA in its review of the effects of the management program pursuant to NHPA. The court issued an order allowing NPS to reinstate its deer management program.

Plaintiffs filed a motion for the court to amend and reconsider the ruling summarized above. In its opinion regarding this motion, the court asserted that the “quiet, contemplative atmosphere” factor

advanced by plaintiffs was not even a “relevant factor” that would need to be considered for the “no adverse effect” finding. An “adverse effect” finding regarding a property’s setting is reached “when that character contributes to the property’s qualification for the National Register.” Section 800.9(b)(2). The court reasoned that a “quiet contemplative atmosphere” was not among the listed National Register criteria.

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***Hoonah Indian Association v. Morrison*, 170 F.3d 1223 (9th Cir. 1998).**

Plaintiffs, Hoonah Indian Association et al., sought an injunction against two timber sales in the Tongass National Forest of Alaska. Both plaintiffs filed a claim under the Alaska National Interest Lands Conservation Act, which is beyond the scope of this report. However, the Sitka Tribe also filed a National Historic Preservation Act claim as to the Northwest Baranof sale. The Sitka argued that defendant, the U.S. Forest Service, improperly handled the designation and protection of the Kiks.adi Survival March path.

However, the appellate court agreed with the district court’s findings, stating that the Forest Service applied the National Register standards to this particular area following a comprehensive search for possible historic properties during the preparation of its Environmental Impact Statement (EIS). Out of the 45 properties identified, 39 were found eligible for inclusion on the National Register. The Kiks.adi Survival March path was not one of these 39 sites. The Forest Service, along with the State Historic Preservation Officer (SHPO), approved this list.

The Sitka Tribe agreed that the 39 sites would not be affected by the timber sale. The SHPO determined that the Kiks.adi Survival March path was not eligible. The tribe did not appeal the SHPO’s decision. Failure to do so made that decision unchallengeable for failure to exhaust administrative remedies.

However, the tribe did appeal the EIS on the ground that the Forest Service did not recommend listing the Kiks.adi Survival March trail. The courts’ review of this was limited to whether this decision was arbitrary or capricious. Although the tribe argued that the Forest Service never applied the National Register criteria to the Survival March routes, the court found that the record showed that it did. The trail did not fit into the definition because, after extensive research by the Forest Service, no evidence could be found to point to any one particular place as

the National Register criteria require. The criteria require an “actual location.” The court found the “actual location” of the Kiks.adi route to be unknown, and the tribe’s own submission called it a “symbolic” location as opposed to an “actual” one.

In affirming the denial of the injunction, the court stated that the fact that important things happen in a general area is not enough to make the area a “site.” For it to qualify for Federal designation as a historical site, there has to be some good evidence of just where the site is and what its boundaries are. The Keeper of the National Register agreed in her report on this issue.

In conclusion, the court stated that the district judge correctly determined that because the tribe could not prevail on the merits, and the Forest Service determinations were not arbitrary or capricious, the tribe’s request for an injunction against the timber sales should be denied.

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***Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999).**

Plaintiffs, Corridor H Alternatives, Inc., and several other environmental and public interest groups, challenged a highway project in West Virginia that had been developed and approved by various Federal agencies. Although study and planning for the Corridor H project, part of the Appalachian Highway Development System, dated from the late 1970s, the project was suspended until 1990 when the current planning efforts were initiated.

The Federal Highway Administration (FHWA) issued the Final Environmental Impact Statement (FEIS) in April 1996, which contained two agreements governing the implementation of the project, including a Programmatic Agreement (PA) establishing procedures for compliance with Section 106 of NHPA.

Plaintiffs filed suit claiming that defendant, FHWA, failed to adequately consider the alternative to improve and use existing roadways and that modifications in the project after the issuance of the FEIS mandated the preparation of a Supplemental Environmental Impact Statement (SEIS). They further questioned FHWA’s approval of the project conditioned on eventual compliance with Section 4(f) of the Department of Transportation Act (DOTA) and alleged that the planned project would improperly use Section 4(f) sites.

Specifically, they asserted: 1) that FHWA violated DOTA Section 4(f) by failing to identify all

the historic sites it was charged with protecting prior to its decision approving the route of the proposed highway, and by erroneously concluding that the highway would not “use” two of the sites it did identify; and 2) that the agency violated the National Environmental Protection Act by failing to give adequate consideration to the improvement of existing roads as an alternative to the construction of the new highway.

The district court held that the agency had complied with both statutes. In the decision granting defendant’s motion for summary judgment, the appellate court noted that the record did not support plaintiffs’ arguments that defendants failed to give substantial consideration to alternatives. Although the FEIS only included a limited discussion of plaintiffs’ preferred alternative, that document references earlier studies where it was analyzed in detail.

The court also determined that FHWA had taken the required “hard look” and that plaintiffs could not show that FHWA’s decision was arbitrary or capricious. While the court recognized that an agency must complete NHPA’s Section 106 review before it can begin compliance with Section 4(f), it found that final approval of the project contingent upon compliance with the Section 106 PA satisfied defendant’s responsibility to achieve “as certain compliance as possible” at the given phase of the project, and noted that implementation of the PA would ensure that full compliance was achieved before any construction begins in an area.

The court dismissed plaintiffs’ arguments that defendant’s condition approach defeated the purposes of Section 4(f), finding that FHWA had considered its approach in light of its regulations and that its interpretation of the statute and its regulations was reasonable and not plainly erroneous.

Additionally, the court held that while defendant may not have concluded Section 4(f) compliance for specific properties, it was clear that defendant had made a final determination about the non-use of Section 4(f) properties, and that determination was ripe for review.

In its concluding remarks, the court stated that nothing in its opinion should discourage plaintiffs from continuing to seek Mt. Graham’s inclusion in the National Register of Historic Places, noting that this opinion may alleviate many of plaintiffs’ concerns.

***City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999).**

Plaintiffs-appellees, City of Alexandria, et al., had challenged the Federal Highway Administration’s (FHWA) compliance with the Clean Air Act, the National Environmental Policy Act (NEPA), Section 106 of the National Historic Preservation Act, and Section 4(f) of the Department of Transportation Act in its approval of plans to replace the Woodrow Wilson Memorial Bridge, which connects Virginia and Maryland over the Potomac River. The district court held in favor of plaintiffs. FHWA appealed the district court’s decision, except the Clean Air Act issue. As explained below, the circuit court decided in favor of FHWA and reversed the district court’s decision.

The district court had found that FHWA violated NEPA because the final Environmental Impact Statement (FEIS) had 1) not afforded detailed consideration to a 10-lane river crossing alternative as a “reasonable alternative”; and 2) insufficiently considered the temporary environmental impact of the construction phase of the project.

The circuit court disagreed. First, it noted that the 10-lane river crossing alternative was not a “reasonable alternative.” The reasonableness of an alternative is judged in light of the objectives of the Federal action. A Federal agency can properly exclude those alternatives that do not bring about the ends of the Federal action. The district court had begun its reasoning by holding that FHWA’s objectives were improper because they focused on transportation and safety needs. The circuit court, however, rejected that argument by finding that such objectives were reasonable in replacing a congested and structurally unsound bridge.

The district court had then held that the 10-lane alternative was reasonable since it fit the “broad” statement of need and purpose of the project. The circuit court, again, disagreed by pointing out that the purpose and need were quite particular and focused on traffic needs projected for the year 2020. The 10-lane alternative, in the circuit court’s view, did not fit those needs in that it would only accommodate half the estimated capacity on peak hours and higher accident rates.

The district court had also held that the 10-lane alternative was a “reasonable alternative” in light of a previous case holding that an agency could not disregard an alternative merely because it did not offer a complete solution to the problem at hand. The circuit court agreed that such was the case within the context

of a coordinated effort to solve a broad problem of national scope and where other agencies may be able to provide the remainder of the solution. The circuit court, however, did not find this to be the case with the Woodrow Wilson Bridge replacement, since it was a discrete project within the jurisdiction of just one Federal agency (FHWA).

The circuit court also reversed the district court's decision that NEPA had been violated due to insufficient consideration of the temporary impact of the construction phase of the project. FHWA's consideration seemed reasonable and justified to the circuit court under the circumstances. FHWA had addressed, however briefly, a range of expected construction impacts. NEPA does not "demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." The circuit court argued that the brevity of FHWA's discussion on construction impact was justified in light of 1) the proper, and arguably required, need for delay in identifying staging sites; 2) the numerous regulatory constraints that will limit the extent of construction activities; and 3) the "relatively modest" disruption caused by the construction itself in terms of scope and duration.

The circuit court then considered the Section 106 and Section 4(f) issues. The district court had found that FHWA had violated Section 106 by postponing the identification of the sites that were to be used for construction-related ancillary activities. It also held that, since it believed FHWA had not completed the Section 106 identification process, FHWA had also necessarily violated Section 4(f). The circuit court disagreed.

FHWA had conducted several surveys that resulted in the identification of 23 historic properties in the project area. A Memorandum of Agreement (MOA) was signed by, among others, FHWA, the State Historic Preservation Officers of Virginia, District of Columbia, and Maryland, and the Advisory Council on Historic Preservation. The MOA identified the sites to be affected by the project and set forth mitigation measures. The MOA also recognized that the identification of historic properties that could be affected by the actual construction activities would have to be postponed until the sites for construction staging, wetland mitigation and dredge disposal sites were selected. Nevertheless, FHWA bound itself through the MOA to fulfill its Section 106 responsibilities when selecting those sites.

Based on the Corridor H Alternatives case (see Case 152), the district court found that postponing those identification efforts meant that the Section 106 process had not been concluded before the approval of the project. This led the district court to find that Section 106 and Section 4(f) had been violated. The

circuit court, however, distinguished the present situation from that in the Corridor H Alternatives case, where FHWA had postponed the entire Section 106 process for a major highway corridor until after it had issued its Record of Decision. By contrast, in the present case FHWA had identified historic properties along the entire project corridor and documented its findings prior to approval of the project. The only part that was deferred was the identification of historic properties "that might be impacted by a small number of 'ancillary activities.'"

Furthermore, FHWA had a good reason for this postponement. The specific identification of construction staging sites requires work that is not conducted until the design stage of the project. The design stage, in turn, may not be completed until after the Final EIS.

Finally, the circuit court noted that the Section 106 regulations in place at the time (i.e., those that went into effect in 1986) allowed the postponement at issue in the present case by encouraging flexibility and specifying they should not be interpreted to prohibit phased compliance at different stages in planning. [Ed. note: the Section 106 regulations that have been in place since 1999 explicitly provide for phased identification of historic properties in certain cases. See 36 C.F.R. § 800.4(b)(2).] The circuit court concluded its discussion of the Section 106 issue by stating that particularly where the sites whose identification is postponed are merely ancillary to the project, Section 106 and the identification prerequisites of Section 4(f) "do not forbid the rational planning process adhered to by" FHWA.

The circuit court ended its opinion by disposing of two Section 4(f) arguments that had been raised by the appellees. The first argument was that FHWA failed to consider all prudent and feasible alternatives to using historic properties. An alternative can only be "prudent" if it satisfies the transportation needs of the project. The circuit court had already held that a narrower bridge did not satisfy the needs of the project. Moreover, appellees did not present a "prudent" alternative that had a less significant impact on historic properties.

The second argument was that FHWA had failed to engage in all possible planning to minimize harm to the historic properties. The circuit court first noted that the appellees did not question the finding that the preferred and selected alternative (of all seven "prudent and feasible" alternatives) would result in the least overall impact to historic properties. Finally, FHWA had mitigation plans for those situations where it could not identify a feasible and prudent plan to avoid impact on a historic property.

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***Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686 (3rd Cir. 1999).**

Danville, Pennsylvania, which contains a historic district that was nominated to the National Register of Historic Places in 1994, is joined with Riverside, the town across the river, by a deteriorating bridge. In the early 1980s, several State and Federal agencies determined that the bridge needed to be replaced. Plaintiffs, the Concerned Citizens Alliance, a group of Danville area residents, sued over defendant Federal Highway Administration's (FHWA) selection of a particular bridge alignment that would send traffic through the Danville Historic District along Factory Street after it exited the new bridge.

Plaintiffs argued that FHWA failed to comply with the requirements of Section 4(f) of the Department of Transportation Act by arbitrarily and capriciously selecting the Factory Street Underpass alignment as the preferred alternative. Plaintiffs claimed that defendants ignored the conclusion of the Advisory Council on Historic Preservation (Council) that another alternative, the Mill Street Plus Bypass alternative, would minimize harm to the Danville Historic District. Additionally, plaintiffs alleged that defendants violated both Section 4(f) and the National Environmental Policy Act (NEPA) by failing to evaluate, in detail, the Mill Street Plus Bypass alternative, which would, in addition to rebuilding the current bridge, build a second bridge about a mile upstream. The second bridge would allow traffic to reach the connection to an interstate highway without going through the center of Danville. The district court granted summary judgment for defendants on all grounds, and this appeal ensued.

In determining whether the FHWA selection of the Factory Street Underpass alternative violated Section 4(f), the circuit court first considered the amount of deference that FHWA owes to the Council. The circuit court noted that the Council was an expert agency created to comment on federally assisted projects involving historic properties. Citing approvingly the decision in *Coalition Against a Raised Expressway, Inc. v. Dole*, (see Case 95), the circuit court stated that "while the [Council's] recommendations do not and cannot control agency decision making, the relevant agency must demonstrate that it has read and considered those recommendations." The circuit court concluded that FHWA must take the Council's comments into account when weighing the alternatives, and must demonstrate that it gave the Council's conclusion

genuine attention: "Congress did not create the [Council] so that it could be a toothless agency."

The circuit court then proceeded to consider whether defendants acted arbitrarily in concluding, pursuant to Section 4(f), that the Factory Street Underpass alternative would inflict the least amount of harm on the historic district. After analyzing each of the plaintiffs' arguments, and thoroughly reviewing the administrative record, the circuit court determined that the record supported FHWA's finding that the Factory Street Underpass alternative would minimize harm to the historic district. The circuit court stated that defendants had performed a large number of studies and weighed the results properly in selecting the preferred alternative. It also found that the record showed FHWA appropriately considered, and responded to, the Council's comments through studies of their own and joint drafting of a Memorandum of Agreement. Therefore, the circuit court held that defendants did not act arbitrarily or capriciously in their Section 4(f) selection of the Factory Street Underpass alternative.

Finally, the circuit court analyzed whether defendants violated NEPA. Plaintiffs contended that the Environmental Impact Statement (EIS) was inadequate because it failed to consider the Mill Street Pls Bypass alternative. NEPA requires that defendants only consider "reasonable" alternatives in the EIS. Courts have found that where an agency has examined other alternatives and leaves out those that do not meet the purpose and need of the project, the agency has satisfied NEPA. The circuit court found that FHWA had adequately determined that the Mills Street Plus Bypass alternative was not feasible due to a low use rate and its excessive construction and environmental costs. This alternative was not reasonable and, thus, did not have to be considered under the EIS.

The circuit court therefore affirmed the district court's grant of summary judgment for defendants.

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

Plaintiffs-appellants Muckleshoot Indian Tribe, et al. ("Muckleshoot Tribe"), argued that the Forest Service violated the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) when it exchanged lands with Weyerhaeuser Company ("Huckleberry Exchange"). Although the district court had granted summary

judgment in favor of the Forest Service, the circuit court reversed.

With the goal of unifying land ownership, thereby enhancing resource conservation and management, the Forest Service traded lands with Weyerhaeuser, a logging company. Weyerhaeuser intended to log the lands it received in the Huckleberry Exchange. Included within the lands traded to Weyerhaeuser were intact portions of the Huckleberry Divide Trail, a historic property important to the Muckleshoot Tribe.

On its appeal, the Muckleshoot Tribe argued that the Forest Service had violated NHPA by 1) failing to consult adequately with the tribe regarding the identification of traditional cultural properties; 2) inadequately mitigating the effects on historic properties; and 3) failing to nominate certain sites to the National Register. The circuit court agreed regarding the claim of inadequate mitigation.

The circuit court found that the Forest Service had adequately consulted with the tribe. The circuit court noted that, unlike the case in *Pueblo of Sandia v. United States* (see Case 132), the Forest Service had not withheld relevant information nor shown bad faith. Moreover, the record showed that the Forest Service had researched historic sites, communicated several times with the tribe, and excluded another site of importance to the tribe from the Huckleberry Exchange. The circuit court noted that the Forest Service could have been more sensitive to the tribe regarding other sites, the information of which the tribe refused to provide. Nevertheless, the Forest Service continued seeking the information over a period of time and had previously conducted research of its own. The circuit court was unable to conclude that the Forest Service had failed to make a reasonable and good faith effort to identify historic properties of importance to the tribe.

However, the circuit court found that the Forest Service violated NHPA by failing to adequately mitigate the adverse effect of the exchange on the Huckleberry Divide Trail. As stated before, Weyerhaeuser planned to log the lands it would get in the Huckleberry Exchange. Such logging could adversely affect the trail and render it ineligible for the National Register. The Section 106 regulations in place at the time of the exchange provided three options under which a Federal agency could mitigate an otherwise adverse effect so that it could be considered as not being adverse. The two options at issue in this case set forth that an adverse effect could be considered not adverse where 1) appropriate research was conducted, provided that “the historic property is of value only for its potential contribution to archeological, historical, or architectural research”; or 2) in the context of a land transaction, “adequate

restrictions or conditions [were] included to ensure preservation of the property’s significant historic features.” The Forest Service argued it was correctly utilizing these two options by mitigating the effects through photographing and mapping the trail before the exchange.

The circuit court, however, found that such activities did not meet the requirements of the two mitigating options listed above. The first option was inapplicable since the Muckleshoot Tribe valued the trail for more than its potential contribution to scientific research. The second option was inapplicable as well since photographing and mapping would not preserve the trail’s significant historic features. The circuit court pointed to a letter by the Washington State Historic Preservation Officer indicating that documentation was “probably not an effective mitigation measure.” Having found this violation of NHPA, the court declined to address the third NHPA allegation.

Plaintiffs-appellants also argued that the Forest Service violated NEPA through 1) inadequate identification and analysis of cumulative environmental impacts in the Environmental Impact Statement (EIS); 2) inadequate definition of the purpose and need for the land exchange; and 3) insufficient identification and evaluation of alternatives for the exchange. The circuit court agreed with the first and third NEPA arguments of the plaintiffs-appellants.

The Muckleshoot Tribe contended that the EIS did not adequately consider the cumulative impacts of logging connected to a land exchange in 1984, to current logging activities, and to a future land exchange in the vicinity. The district court had held that the Forest Service did not need to consider such impacts since the 1984 land exchange was already considered in an earlier land management plan, and the future land exchange was too uncertain. The circuit court disagreed. It first noted that NEPA allowed reference to past consideration (also known as “tiering”) but only with regard to an EIS—not to a land management plan. Furthermore, the EIS for the land management plan did not account for the specific impacts of the Huckleberry Exchange. The Huckleberry Exchange was only mentioned in a pool of possible projects, without any detail concerning it or its impact. Furthermore, the cumulative impact analysis on the EIS for the Huckleberry Exchange was deemed by the circuit court to be too general and one-sided. It was devoid of specific, reasoned conclusions. In addition, it did not evaluate the impact of logging on the natural resources on the land transferred to Weyerhaeuser.

Regarding the future land exchange in the vicinity (“Plum Creek Exchange”), the circuit court

agreed with the tribe that such an exchange was “reasonably foreseeable” and that its cumulative impacts should have been adequately analyzed. Before the Huckleberry Exchange EIS was issued, the Forest Service had prepared a summary of the Plum Creek Exchange, and the Secretary of Agriculture had formally announced the exchange to the public.

The circuit court disagreed with the plaintiffs-appellants’ assertion that the purpose and need in the EIS of the Huckleberry Exchange was too narrow. The purpose and need was to “consolidate ownership and enhance future resources conservation and management by exchanging parcels of National Forest System and Weyerhaeuser land.” The circuit court found the breadth of the purpose and need to be reasonable.

However, the circuit court held that the Forest Service failed to consider an adequate range of alternatives to meet the stated purpose and need of the Huckleberry Exchange. The Forest Service only considered three alternatives: a no action alternative and two alternatives that only differed in that one labeled the land transfer as a donation, rather than as an exchange, and added 141 acres of donated land. The Forest Service failed to consider an alternative where it would purchase the land from Weyerhaeuser rather than exchanging for it. The circuit court also found that the Forest Service should have closely considered a trade involving deed restrictions or other modifications to the acreage involved.

Finally, the circuit court considered Weyerhaeuser’s argument that the case was moot because the patents and deed to the exchanged lands had been conveyed and logging permits from Washington had been secured. Weyerhaeuser attorneys also stated in oral arguments that their company had already “destroyed” at least 10 percent of the land it obtained on the exchange. The circuit court held that the case was not moot. It noted that conveyance of property does not moot a case, and that Federal courts are authorized to void a property transaction. The evidentiary burden needed to establish mootness was not met. The circuit court then enjoined any further activities pursuant to the Huckleberry Exchange until the Forest Service satisfied its NHPA and NEPA obligations.

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Sac and Fox Nation of Missouri v. Babbitt, 92 F.Supp.2d 1124 (D. Kan. 2000).

Plaintiffs brought this action, challenging the decision of the Department of the Interior Secretary

(Babbitt) to take .52 acres of land into trust on behalf of the Wyandotte Indian Tribe of Oklahoma. The underlying concern of plaintiffs was that the Wyandotte Tribe would use the land as a location for gambling.

Public Law 98-602 appropriated funds, and specifically required that they be used to purchase the land at issue “which shall be held in trust by the Secretary for the benefit” of the Wyandotte Tribe. Among other things, plaintiffs alleged that Secretary Babbitt had violated the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) in taking the land into trust. However, in a brief opinion, the court held that NEPA and NHPA were not applicable because Babbitt was performing a nondiscretionary duty and a “merely ministerial role.” The court cited the cases of *Lee v. Thornburgh* (see Case 100), and *U.S. v. 162.20 Acres of Land* (see Case 86).

The court, however, noted that NEPA and NHPA would apply to future actions related to the property.

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Western Mohegan Tribe and Nation v. New York, 100 F.Supp.2d 122 (N.D.N.Y. 2000).

Plaintiffs, Western Mohegan Tribe and Nation, et al., sued the State of New York, alleging that the State’s construction of a proposed State park violated the Native American Graves Protection and Repatriation Act (NAGPRA), the National Historic Preservation Act (NHPA), and the First Amendment of the Constitution. Plaintiffs sought a preliminary injunction against the State. There were no Federal defendants. The court not only denied plaintiffs’ motion for the injunction, but also dismissed the case *sua sponte*.

Plaintiffs, a non-federally recognized tribe, contended that the site of the proposed park was of religious and cultural significance to the tribe.

The court first dismissed the NAGPRA claim. It noted that NAGPRA only applies to “Federal” and “tribal” lands. Although the Federal Government owns a nearby parcel of land, placed under the jurisdiction of the Corps of Engineers (“Corps”), such parcel is not part of the proposed park. And, even though the Corps issued a permit to defendants to allow construction activities, and gave a license to the State allowing it to be present on the Federally owned parcel, such actions did not transform the park land into “Federal” land. The court also found that there could be no feasible claim that the park area comprised “tribal” land. Finally, the court also stated

that NAGPRA applied to cultural and funerary objects already possessed or under the control of a Federal agency or museum, or to those already discovered or excavated. The State had not seen any indication of Native American artifacts.

The court proceeded to dismiss NHPA claim. The court noted that local actions fell beyond the scope of NHPA. Regarding the permit issued by the Corps (who was not a defendant), the court found that it merely allowed the State access to the contiguous Federal property and did not extend Corps jurisdiction over the park site. Furthermore, even though it was a “permit,” it was not legally required. Finally, in a two-sentence dicta, the court indicated that even if the permit was required, NHPA “clearly contemplates a federal funding requirement,” and “[t]he Park simply is not ‘funded in whole or in part under the direct or indirect jurisdiction of a Federal agency.’”

Finally, the court also dismissed the First Amendment allegation. Plaintiffs claimed that the State’s proposed fees for access to the island where the park would be sited would violate their Free Exercise Rights. The court found that plaintiffs had no standing since they could not prove that they were Native Americans nor descendants of the original tribe of the island where the park would be located. Accordingly, the fee imposed no cognizable injury to plaintiffs. Among other things, the court noted that plaintiffs’ application for recognition as a tribe had been rejected by the Bureau of Indian Affairs “due to significant deficiencies, unverifiable statements, doctored original documents, and significant omissions in all areas required” by the regulations. The court also cited as persuasive an archeologist’s affidavit stating that the Mahicans—a tribe with no cultural links to the Mohegans, and actually hostile to them—occupied the island.

Finding no jurisdiction over the NAGPRA and NHPA claims, and a lack of standing by plaintiffs regarding the First Amendment claim, the court dismissed the entire case *sua sponte*.

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***Young v. General Services Administration*, 99 F.Supp. 59 (D.D.C. 2000).**

As unsuccessful bidders for a Federal building project and as neighboring residents, plaintiffs brought action against the General Services Administration (GSA) under the National Environmental Policy Act (NEPA) challenging the adequacy of the Environmental Impact Statement prepared for the project. Plaintiffs also claimed GSA had violated NHPA by failing to 1) examine the impacts on historic

properties adequately and avert such impacts; and 2) prevent the destruction of a historic property by the successful bidder. The successful bidder intervened in the case. The parties filed cross-motions for summary judgment. The court ruled in favor of GSA and the intervenor, granting their motions for summary judgment.

Regarding the NEPA claims, the district court held that GSA was not required to consider the unsuccessful bidder’s alternative scenario for the proposed project. Such alternative simply did not meet all of the requirements in GSA’s solicitation for offers. The court also found that GSA’s reliance on the State department of transportation’s studies to determine the impact of the project on traffic was a reasonable means to satisfy the “hard look” requirement of NEPA.

The court proceeded to analyze plaintiffs’ NHPA claim. Plaintiffs argued that GSA violated NHPA by failing to prevent the successful bidders from destroying a historic roundhouse located on the site of the proposed building project. However, the court first noted that GSA was fully cognizant of the requirements of Section 110(k) of NHPA. Section 110(k) prohibits Federal agencies from providing grants, loans, permits, or other assistance to any applicant who, with the intent to avoid the requirements of Section 106 of NHPA, destroys a historic property, unless the agency consulted with the Advisory Council on Historic Preservation (Council) to determine whether such assistance was nevertheless justified. Once the property was demolished, the Council told GSA that GSA had to determine whether the bidder had destroyed the property with the intent to avoid the requirements of Section 106.

GSA not only determined such an intent was not present, but also that circumstances justified keeping the bidder despite the destruction of the property. The property owner had been working since 1988 to secure a master plan for the property, which included demolition of the historic property. The record supported the contention that the historic property was scheduled for demolition in the early 1990s, long before the Federal project in this case existed. The record also indicated that in 1995 the city of Alexandria, Virginia, required photos of the historic property “prior to the planned private demolition under its city’s archeology ordinance.”

The court therefore agreed with GSA, and concluded that the demolition was not intended to avoid Section 106 requirements, and therefore not in violation of the provisions of Section 110(k).

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