ALI-ABA Course of Study
Historic Preservation Law

Cosponsored by the National Trust for Historic Preservation

November 3-4, 2005
Washington, D.C.

Recent Developments in Case Law Interpreting the National Historic Preservation Act (NHPA): 1990 to the Present

By
Andrea C. Ferster
Washington, D.C.

© Copyright 2005. Andrea C. Ferster, Esquire. All Rights Reserved.
Recent Developments in Case Law Interpreting the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470, et seq. 1990 to the present

The basic federal law establishing the Nation’s historic preservation policy and the stewardship obligations of federal agencies with respect to historic properties is the National Historic Preservation Act (“NHPA”), 16 U.S.C. §§ 470, et seq. The NHPA provides that it shall be the policy of the federal government to provide leadership in the preservation of America’s historic resources and to “administer federally owned, administered, or controlled . . . historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations.” Id. § 470-1. Its key protections to historic properties are contained in Section 106 and Section 110.

I. Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f

Section 106 prohibits federal agencies from approving any federal “undertaking,” including the issuance of any license or the approval of federal assistance, that could adversely affect historic properties, unless the agency, in consultation with the State Historic Preservation Officer (“SHPO”) and/or Tribal Historic Preservation Officer (“THPO”): (1) takes into account the effects of the undertaking on historic properties; and (2) affords the Advisory Council on Historic Preservation (“ACHP”), an independent federal agency, a reasonable opportunity to comment on the undertaking. Id. § 470f.

The Advisory Council has promulgated binding regulations that define agency responsibilities under Section 106. See 36 C.F.R. Part 800 [as amended, 2004]; 69 Fed. Reg. 40,554 [July 6, 2004]; 65 Fed. Reg. 77,698 [Dec. 12, 2000]. The Section 106 regulations have been accorded substantial deference by the Courts. See McMillan Park Committee v. National Capital Planning Comm’n, 968 F.2d 1283, 1288 [D.C. Cir. 1992]; National Mining Ass’n v. Slater, 167 F. Supp. 2d 265, 280 [D.D.C. 2001], rev’d on other grounds sub nom. National Mining Ass’n v. Fowler, 324 F.3d 752 [D.C. Cir. 2003]. The regulations establish a three-step process: First, the agency must identify any historic properties that may be affected by the undertaking. 36 C.F.R. § 800.4. Second, after historic properties are identified, the agency must assess the undertaking’s effects. Id. § 800.5. Third, agencies must seek ways to avoid or mitigate adverse impacts. Id. § 800.6. Each of these steps must be conducted in consultation with the SHPO/THPO, and any interested consulting parties.

Much of the recent litigation involving Section 106 focuses on whether the agency action is an “undertaking,” whether the agency violated Section 106 or the ACHP regulations, and jurisdictional limitations on Section 106 enforcement actions.
1. What is an "Undertaking" Subject to Section 106?

Section 106 applies to federal “undertakings,” as well as undertakings that involve federal financial assistance, or a federal license, permit, or approval. Most of the cases interpreting the term “undertaking” in Section 106 involve relatively unusual types of federal oversight roles.

- **Business & Residents Alliance of East Harlem v. Martinez**, No. 03 Civ. 5363 [JFK] (S.D.N.Y. June 11, 2004), appeal pending, No. 04-4493 [2d Cir., argued Sept. 27, 2005]. Lower court held that actions by US Departments of Housing & Urban Development (HUD) and Health & Human Services (HHS) involving designation of and block grant financial assistance to urban empowerment zones do not require compliance with Section 106.

- **Vieux Carré Property Owners, Residents & Associates, Inc. v. Brown**, 875 F.2d 453 (5th Cir. 1989), cert. denied, 493 U.S. 1020 [1990]. Verification by U.S. Army Corps of Engineers that a project is subject to a Nationwide Permit is subject to Section 106, unless the permit authorizes “truly inconsequential” activities from the perspective of impact on navigable waters. [Note: the “truly inconsequential” formulation has not been followed by other courts, and has been superseded by amendments to the Section 106 regulations, which now provide that an agency has no obligation to consult with respect to an undertaking that “is a type of activity that does not have the potential to cause effects on historic properties . . . .” 36 C.F.R. § 800.3[a][1].]

- **McMillan Park Committee v. National Capital Planning Comm’n**, 968 F.2d 1283 (D.C. Cir. 1992). Court held that federal agency’s review of an action affecting a particular historic property was not a new “undertaking” where property had previously been the subject of a Section 106 review by a different agency.

- **Sugarloaf Citizens Ass’n v. FERC**, 959 F.2d 508 (4th Cir. 1992). FERC order certifying incinerator as small power production facility under the Public Utility Regulatory Policies Act was not an “undertaking,” since FERC had no authority to approve construction or operation of the facility, but merely regulates the rates paid by users, and because FERC certification was ministerial in nature.

- **Sheridan Kalorama Historical Ass’n v. Christopher**, 49 F.3d 750 (D.C. Cir. 1995). Court held that State Department decision not to exercise its power to veto plan of chancery to demolish its present historic chancery building was not an “undertaking” because failure to veto a project is not tantamount to a “license.”

- **Indiana Coal Council v. Lujan**, 774 F. Supp. 1385 [D.D.C. 1991], vacated in part and appeal dismissed, 1993 U.S. App. LEXIS 14561 [D.C. Cir. Apr. 26, 1993], appeal dismissed, No. 91-5398 [D.C. Cir. Dec. 2, 1993]. Court held that surface mining permits issued by states pursuant to authority delegated by Office of Surface Mining (OSM) was an “undertaking” subject to Section 106 because OSM retained a “powerful oversight role” over the state agencies. But see **National Mining Ass’n v. Fowler**, 324 F.3d 752 [D.C. Cir. 2003] [Section 106 not applicable to state-issued permits themselves].
• North Oakland Voters Alliance v. City of Oakland, 1992 WL 367096 (N.D. Cal. Oct. 6, 1992). Court held demolition-by-neglect that could adversely affect historic properties is actionable under Section 106.

2. Timing of Section 106

The Courts have reached conflicting opinions on the extent to which Section 106 issues and compliance can be deferred until after a license has been issued. A recent decision has held that, although an agency is permitted to defer completion of Section 106 until the National Environmental Policy Act ("NEPA") process has run its course, NHPA issues must be resolved by the time the license is issued. Mid States Coalition for Progress v. Surface Transp. Bd., 345 F.3d 520 [8th Cir. 2003], rehearing en banc denied, 2004 U.S. App. LEXIS 1506 [8th Cir. Jan. 30, 2004]. However, several decisions have allowed agencies wider latitude in approving projects or issuing "conditional approvals" without completion of the Section 106 process:

• City of Alexandria v. Slater, 198 F.3d 862 [D.C. Cir. 1999]. Highway agency did not violate Section 106 when it executed MOA that postponed consideration of impacts from "ancillary" construction activities, such as borrow pits and staging areas.

• Knowles v. U.S. Coast Guard, 1997 U.S. Dist. LEXIS 3820, 44 ERC (BNA) 2070 [S.D.N.Y. 1997]. Coast Guard did not violate NEPA and NHPA when it signed a Finding of No Significant Impact under NEPA and made its final decision prior to completing the Section 106 process by finalizing a Programmatic Agreement.

• City of Grapevine v. Department of Transportation, 17 F.3d 1502 [D.C. Cir.], cert. denied, 513 U.S. 1043 [1994]. Court held that FAA did not violate Section 106 when it conditionally approved plans to build new airport runway and other facilities subject to post-approval compliance with Section 106, so long as compliance occurred prior to construction of challenged runway.

• Yerger v. Robertson, 981 F.2d 460 [9th Cir. 1992]. Decision of the U.S. Forest Service not to renew a use permit for a recreational facility and concessionaire could precede compliance with Section 106 as a "nondestructive planning activity" so long as historic concession facilities were not removed prior to completion of Section 106.

3. Failure to Consult Under Section 106

Section 106 and the ACHP regulations impose procedural obligations on agencies to consult with the State Historic Preservation Officer ("SHPO"), the ACHP, affected Indian Tribes, and members of the public in taking into account the effect of its projects or programs on historic properties. Courts have not permitted agencies to make unilateral determinations under Section 106 without soliciting the views of these consulting parties.

• Mid States Coalition for Progress v. Surface Transp. Bd., 345 F.3d 520 [8th Cir. 2003], rehearing en banc denied, 2004 U.S. App. LEXIS 1506 [8th Cir. Jan. 30, 2004]. Agency did not violate Section 106 by refusing to grant consulting party status to all individuals and organizations who made such a request, or by utilizing NEPA public participation mechanism to allow comment from the public on historic preservation matters.
• **Save Our Heritage, Inc. v. Federal Aviation Admin.**, 269 F.3d 49 [1st Cir. 2001]. Agency failure to consult with the SHPO or ACHP in determining that permit had no potential to affect historic properties was harmless error, since agency findings were supported by record.

• **Friends of Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.**, 252 F.3d 246 [3d Cir. 2001] Court held that Surface Transportation Board (STB) erred in not giving sufficient consideration to the views of the ACHP or the Keeper of the National Register, and that the STB’s purported “termination” of consultation failed to comport with the Section 106 regulations.

• **Committee to Save Cleveland’s Hulets v. U.S. Army Corps of Engineers**, 163 F. Supp. 2d 776 [N.D. Ohio 2001]. Court held that alleged “telephone authorization” from the SHPO could not substitute for the written notification required by the ACHP’s Section 106 regulations. The Court also held that the Army Corps could not rely on its own regulations where those regulations were at variance with the ACHP’s regulations, and where the ACHP had never concurred in the Corps’ regulations.

• **Pueblo of Sandia v. United States**, 50 F.3d 856 [10th Cir. 1995]. Forest Service violated Section 106 by failing adequately to identify potential traditional cultural properties affected by undertaking, ruling that agency’s mailing of form letters soliciting information from Indian Tribe and its failure to consult in “good faith” with the SHPO violated Section 106.

• **Presidio Golf Club v. National Park Service**, 155 F.3d 1153 [9th Cir. 1998]. National Park Service (NPS) not required to consider private Golf Club an “interested or consulting party” in Section 106 consultation where NPS found that proposed undertaking to curtail Golf Club’s preferential access to golf facilities and to build a new public golf course clubhouse would not adversely affect historic clubhouse owned by private Club.

• **Muckleshoot Tribe v. U.S. Forest Service**, 177 F.3d 800 [9th Cir. 1999]. Court held that determination by the U.S. Forest Service that transfer of historic trail to a logging company would have no adverse effect on trail based on proposed “mitigation” consisting solely of photographing and documenting trail violated Section 106, and that agency is obligated “to minimize the adverse effect of transferring the intact portions of the trail.”

• **Attakai v. United States**, 746 F. Supp. 1395 [D. Ariz. 1990] Court held that Bureau of Indian Affairs violated Section 106 when it failed to consult with the SHPO in identifying historic properties potentially affected by proposed undertaking to construct fence and livestock watering facilities on Hopi Indian Reservation.

4. **Area of Potential Effects**

   Agencies must determine and document an “area of potential effects” (“APE”), and then must identify historic properties within the APE, and assess the project’s effects on those historic properties. 36 C.F.R. §§ 800.4[a], 800.5[a]. The courts have largely upheld an agency’s determination of the APE. **City of Alexandria v. Slater**, 198 F.3d 862 [D.C. Cir. 1999]; **Valley Community Preservation Comm’n v. Mineta**, 373 F.3d 1078 [10th Cir. 2004].
5. Agreement Documents Under Section 106

Where an undertaking is found to have adverse effects on historic properties, the Section 106 process can be concluded in only two ways. First, the Section 106 can be concluded through the execution of a Memorandum of Agreement (“MOA”) between the SHPO, the agency, and the ACHP, should it choose to participate in the consultation, and any “consulting parties.” Agencies may also execute “Programmatic Agreement” for programs or certain complex project situations or multiple undertakings, such as for undertakings whose effects on historic properties are similar or repetitive, or where the effects on historic properties cannot be determined prior to approval of an undertaking, as negotiated. 36 C.F.R. § 800.14(b)(1). The courts are unlikely to second-guess the consulting parties’ decision to proceed using a Programmatic Agreement rather than an MOA. Lesser v. City of Cape May, 110 F. Supp. 2d 303 [D.N.J. 2000], aff’d, 78 Fed. Appx. 208, 2003 WL 22367169 [3d Cir. Oct. 17, 2003].

If executed, the MOA or PA represents a binding and enforceable agency obligation, which governs the undertaking and all of its parts. 16 U.S.C. § 470h-2[1]. According to statistics maintained by the ACHP, an agreement was reached in 99.8 % of the cases submitted for Council review during 1996-97. See Advisory Council on Historic Preservation, Report to the President and Congress: 1996-1997, at 16. Second, and more rarely, the Section 106 process can be concluded where the head of the agency requests the ACHP’s formal comments. 16 U.S.C. § 470h-2[2]. The head of the agency must take the ACHP’s comments into account “in reaching a final decision on the undertaking” and must document that decision and make it available to the public. 36 C.F.R. § 800.7(c)(4).

The following cases address the enforcement of MOAs:

- Tyler v. Cuomo, 236 F.3d 1124 [9th Cir. 2000]. Court held that members of the public had standing to enforce MOA as “third party beneficiaries” to the agreement even though they were not signatories, where MOA specifically gave members of the public right to make objections.

- Waterford Citizens Ass’n v. Reilly, 970 F.2d 1287 [4th Cir. 1992]. Court declined to enforce MOA executed by EPA in the early 1970s in connection with construction of a sewer system in a historic village, finding that completion of the project had extinguished the EPA’s continuing obligations under the MOA. As a result, expansion of the sewer system without additional federal assistance was not subject to Section 106 review.

- Coalition of 9/11 Families, Inc. v. Rampe, 2005 WL 323747 [S.D.N.Y. Feb. 8, 2004]. Court declined to enforce PA requirements concerning HABS/HAER documentation, since the stipulation in question did not reference consulting parties, while other stipulations in the PA did specifically reference consulting parties, and the plaintiffs lacked standing because they were not signatories to the PA.

6. Program Alternatives

The Section 106 regulations provide for a number of “program alternatives” by which agencies, in consultation with the ACHP, may develop procedures that substitute for the Section 106 regulations. 36 C.F.R. § 800.14. For example, agencies may develop alternate procedures, through notice and comment rule-making. Id. § 800.14[a]. However, these regulations must be consistent with the ACHP’s regulations. 16 U.S.C. § 470h-2[a][2][E][f]. The courts have declined to enforce agency

7. Jurisdictional/Constitutional Barriers to Judicial Review Under the NHPA

While the NHPA contains a provision indicating that enforcement actions may be brought in any district court, 16 U.S.C. § 470w-4, judicial review can still be limited or even precluded by Article III, prudential, or equitable principles or by other statutory provisions.

(A) Mootness

In general, an NHPA enforcement action will be mooted by either destruction of the resources, or completion of the project that will adversely affect historic properties. Voluntary compliance with the NHPA may also moot a case where the unlawful conduct is unlikely to recur.

• Luna v. England, No. 02-0395 [D.D.C. March 18, 2004]. Court held that action to prevent Navy from enforcing invalid MOA is moot where Navy provided binding assurances on the record that it would not likely rely on the invalid MOA, and principles of judicial estoppel would therefore preclude the Navy from taking an inconsistent position in future litigation.

• Vieux Carré Property Owners, Residents & Associates, Inc. v. Brown, 948 F.2d 1436 [5th Cir. 1991]. Court held that case was not moot even though challenged aquarium was already constructed if the Section 106 consultation process could conceivably result in some remedial action.

• Gettysburg Battlefield Preservation Ass’n v. Gettysburg College, 799 F. Supp. 1571 [M.D. Pa. 1992], aff’d, 989 F.2d 487 [3d Cir. 1993]. Section 106 [and NEPA] challenge to decision of Department of the Interior to transfer a portion of the Gettysburg Battlefield to a college was moot, since challenged land transfer had already occurred, and the action about which Plaintiff was concerned was the action of a private railroad company, to whom the college had transferred an easement over the former park land.

(B) Laches/Statute of Limitations

Majority rule: There is no express or implicit statute of limitations in the NHPA; the extent to which delay can bar judicial review is governed by the equitable doctrine of laches.

• Tyler v. Cisneros, 136 F.3d 603 [9th Cir. 1998]. Court held that statutory language of Section 106 requiring that consultation occur “prior to” issuance of any license or approval of funding does not constitute an “implicit statute of limitations” that bars enforcement actions after the release of grant funds by HUD.

• Apache Survival Coalition v. United States, 21 F.3d 895 [9th Cir. 1994]. Section 106 enforcement action barred by laches where plaintiffs ignored early notification about project and failed to participate in the Section 106 process, and project was 35 percent complete when the lawsuit was filed.
• **Apache Survival Coalition v. United States**, 118 F.3d 663 [9th Cir. 1997]. Section 106 enforcement action barred by laches where plaintiffs waited two years after re-location of telescope to bring action after challenges launched by other parties had failed.

 **Minority Rule:** Six-year statute of limitations contained in Tucker Act applicable to actions challenging NHPA compliance. See **Daingerfield Island Protective Society v. Babbitt**, 40 F.3d 442 [D.C. Cir. 1994].

(C) Ripeness

• **Brewery Dist. Soc’y v. FHWA**, 996 F. Supp. 750 [S.D. Ohio 1998]. Allegations in complaint alleging violation of 16 U.S.C. § 470h-2|k| (barring agencies from funding or approving projects where historic properties were intentionally demolished by applicants in anticipation of the application for federal involvement for the purpose of evading Section 106) is not ripe for review until an application for federal assistance is filed.

• **Morongo Band of Indians v. FAA**, 161 F.3d 569 [9th Cir. 1999]. Tribe’s Section 106 challenge to FAA rule establishing flight free zones over Grand Canyon based on alleged impacts to adjacent traditional cultural properties not ripe for judicial review until FAA issues final corridor and route structure.

• **New Hanover Township v. U.S. Army Corps of Engineers**, 992 F.2d 470 [3d Cir. 1993]. Court held that NHPA challenge to Army Corps’ nationwide permit was not ripe because the applicant still needed permit from the state.

(D) Standing

• **Pye v. U.S. Army Corps of Engineers**, 269 F.3d 459 [4th Cir. 2001] (adjacent landowners whose property included historic site that would be adversely affected by Army Corps project had standing under Section 106).

• **Save Our Heritage, Inc. v. Federal Aviation Admin.**, 269 F.3d 49 [1st Cir. 2001] Likelihood and extent of injury to Petitioners is best addressed in connection with the merits rather than as a challenge to Petitioners’ standing.

• **Tyler v. Cuomo**, 236 F.3d 1124, 1132 [9th Cir. 2000]. Court held that injury-in-fact may be established by the ownership of property that may be affected by the challenged action, and stated that “[w]hether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits.”

• **Society Hill Towers Owners’ Ass’n v. Rendell**, 210 F.3d 168 [3d Cir. 2000] (group of residents living in historic district had standing to challenge project in their neighborhood based on alleged increases in traffic, pollution and noise, and decreases in property values).

• **Presidio Golf Club v. National Park Service**, 155 F.3d 1153 [9th Cir. 1998]. Private Golf Club which owned historic club house on National Park Service [NPS] property possessed standing to challenge NPS’s alleged noncompliance with Section 106 in connection with decision to
curtail Golf Club’s preferential access to golf facilities and to build a new public golf course clubhouse, since Club’s concern about the effect of NPS’s actions on historic private club house were within the zone of interests protected by the NHPA, and the likely loss of members to the private club was fairly traceable to the NPS’s actions, and could result in destruction or decay of historic clubhouse.

- **Brewery Dist. Soc’y v. FHWA**, 996 F. Supp. 750 [S.D. Ohio 1998]. Plaintiffs had standing to challenge City’s anticipatory demolition of historic properties based on injury resulting from Federal Highway Administration’s proposed assistance to the City for related highway projects, which is not hypothetical or conjectural.

- **But see; Coalition of 9/11 Families, Inc. v. Rampe**, 2005 WL 323747 [S.D.N.Y. Feb. 8, 2004]. Court held that consulting parties lacked standing to enforce PA requirements concerning HABS/HAER documentation, since the stipulation in question did not reference consulting parties, while other stipulations in the PA did specifically reference consulting parties.

**(E) Exhaustion of Administrative Remedies**

Disputed issues concerning National Register-eligibility must first be raised before the Keeper of the National Register before they can be heard in Court. See **Hoonah Indian Ass’n v. Morrison**, 170 F.3d 1223 [9th 1996] [native groups failed to exhaust their administrative remedies when they did not avail themselves of the regulatory procedure for appealing disputed eligibility issue to the Keeper of the National Register).

**(F) Statutory Preclusion of Judicial Review**

While the NHPA has a private right of action [16 U.S.C. § 470w-4], the following cases illustrate how other statutes can preclude judicial review of NHPA claims:

- **Boarhead Corp. v. Erickson**, 923 F.2d 1011 [3d Cir. 1991]. Court held that Section 113 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) precludes judicial review of actions challenging EPA’s superfund cleanup or pre-cleanup actions until those activities have been completed, even if those actions could result in a violation of Section 106.

- **Friends of Sierra Railroad v. ICC**, 881 F.2d 663 [9th Cir. 1989], cert. denied, 493 U.S. 1093 [1990]. Court held that ICC refusal to re-open administratively final decision to authorize abandonment of a railroad line to hear allegation that ICC failed to comply with Section 106 was not subject to judicial review by the court of appeals since petition for review was not based on new evidence or changed circumstances.

- **Bywater Neighborhood Ass’n v. Tricarico**, 879 F.2d 165 [5th Cir. 1989], cert. denied, 494 U.S. 1004 [1990]. District court lacked jurisdiction over challenge to Federal Communications Commission (“FCC”) order allowing construction of a satellite station and microwave tower in historic district, since under the Hobbs Act, 28 U.S.C.§ 2342, the courts of appeal had exclusive jurisdiction to review FCC final orders.
II. Section 110 of the NHPA

A. Stewardship Responsibilities

Section 110(a) of the NHPA imposes stewardship obligations on federal agencies to identify and preserve historic properties which are owned or controlled by federal agencies. 16 U.S.C. § 470h-2. Section 110 of the NHPA requires federal agencies identify, inventory and nominate to the National Register of Historic Places, historic properties which are owned or controlled by such agency, and to “undertake, consistent with the preservation of such properties and the mission of the agency, . . . any preservation, as may be necessary to carry out this section.” 16 U.S.C. § 470h-2(a). The U.S. Department of the Interior has developed guidance for federal agencies regarding compliance with Section 110 of the NHPA. See Secretary of the Interior’s Standards and Guidelines for Federal Agency Responsibilities Under Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20496 (April 24, 1998). The following cases have interpreted agencies’ Section 110 responsibilities:

- Commonwealth of Kentucky v. U.S. Army Corps of Engineers, No. 89-77 (E.D. Ky. Sept. 21, 1992) [unpublished]. Court held that while Section 110 requires agencies to prevent historic properties from deteriorating, it does not require agencies to rehabilitate surplus property.
  Note: this case interprets Section 110 prior to the 1992 amendments to the NHPA

- National Trust for Historic Preservation v. Blanck, 938 F. Supp. 908 (D.D.C. 1996), aff’d, 1999 U.S. App. LEXIS 29703, 203 F.3d 53 [D.C. Cir. Oct. 22, 1999]. Court held that Section 110 does not create substantive preservation obligations separate and apart from the overwhelmingly procedural thrust of the NHPA and Section 106. The Court also concluded that while the Army had failed to comply with its procedural obligations under Sections 106 and 110 for an eight year period with respect to Army-owned historic district, resulting in serious damage and deterioration to historic properties, the Court lacked authority to order the Army to remedy this damage or spend funds to halt future deterioration.

B. Anticipatory Demolition

The NHPA requires agencies to take action to prevent permit applicants from intentionally, significantly adversely affecting a historic property in order to avoid the requirements of Section 106. 16 U.S.C. § 470h-2[k]. However, this provision cannot be invoked to forestall future applications based on suspicion that additional permits may be sought. Committee to Save Cleveland’s Huletts v. U.S. Army Corps of Engineers, 163 F. Supp. 2d 776 [N.D. Ohio 2001] [invocation of Section 110[k] is not yet ripe for judicial review]; Brewery Dist. Soc’y v. FHWA, 996 F. Supp. 750 [S.D. Ohio 1998] [same].

While not invoking Section 110[k], one court has held that an injunction may be issued that bars the agency from seeking or accepting any federal reimbursement, direct or indirect, for the project due to concerns that a local agency might demolish historic properties and then later apply for federal
funds for the project as a means of avoiding Section 106, and other federal laws protecting historic
properties in the context of federal transportation projects. Old Town Neighborhood Ass’n v. Peters,
333 F.3d 732 (7th Cir. 2003)

III. Other Provisions of the NHPA

A. National Register of Historic Places

The NHPA authorizes the Secretary of the Interior to expand and maintain a National Register
of Historic Places composed of districts, sites, buildings, structures, and objects significant in
American history, architecture, archeology, engineering, and culture. 16 U.S.C. § 470a(a)(1)(A). The
National Park Service has promulgated regulations governing National Register nominations. 36
(2d Cir. 1999), the Court upheld a decision by the Keeper of the National Register of Historic Places
deciding to remove a property from the National Register, despite alleged procedural flaws in the
state’s process for nominating properties to the National Register. The Court also ruled that the
Keeper’s action did not violate any due process rights, reasoning that “national listing on its own does
not impose any burdens on plaintiffs’ use of their property.”

B. Attorneys’ Fees/Private Right of Action Under the NHPA

The 1980 amendments to the NHPA added an attorney’s fee provision added to the NHPA,
authorizing the award of attorneys’ fees and costs in “any civil action brought in any United States
district court by any interested person to enforce the provision of this Act, if such person substantially
prevails in such action.” 16 U.S.C. § 470w-4. Past decisions have authorized awards of attorneys’ fees
even where plaintiffs did not technically “win,” but obtained a positive outcome as result of the
litigation. See, e.g., Paulina Lake Historic Cabin Owners Ass’n v. U.S. Dept. of Agriculture, 577 F.
Supp. 1188 (D. Or. 1983). However, a 2001 decision by the U.S. Supreme Court rejected the “catalyst”
theory for awarding attorneys fees, holding instead that the Plaintiff must achieve a “court-ordered
change [in] the legal relationship between [the plaintiff] and the defendant.” Buckhannon Board &
Care Home, Inc. v. West Va. Dep’t of Health and Human Resources, 532 U.S. 598, 604 (2001) [citations
omitted].

The effect of Buckhannon in NHPA cases was addressed in one recent decision, Preservation
Coalition of Erie County v. Federal Transit Administration, 356 F.3d 444 (3d Cir. 2004), in which the
Court held that Plaintiffs could recover attorneys’ fees in a case that was settled prior to final
judgment, notwithstanding Buckhannon, based on the fact that the district court had issued an order
directing the defendants to prepare a Supplemental Environmental Impact Statement (“SEIS”) to
address certain subsequently discovered historic properties, in response to a motion for interlocutory
injunctive and mandamus relief. The Court also noted that market rate attorneys’ fees were available
under the NHPA, even though the Court-ordered relief was based on the National Environmental
Policy Act (“NEPA”), since the SEIS was also a form of relief under the NHPA inasmuch as the Section
106 regulations provide for integrated NEA/NHPA procedures.

A number of courts have also held that the NHPA’s attorneys’ fee provision creates a private
right of action authorizing actions in court to enforce the NHPA, although that private right of action
may be trumped by a separate statutory preclusion of judicial review under the agency’s organic act:

• Boarhead Corp. v. Erickson, 923 F.2d 1011, 1017 (3d Cir. 1991)

• **Bywater Neighborhood Assoc. v. Tricarico**, 879 F.2d 165, 167 (5th Cir. 1989), cert. denied, 494 U.S. 1004 (1990)


Two courts have held that the NHPA does not create a private right of action independent of the APA:


• **San Carlos Apache Tribe v. United States**, No. 03-16874 [9th Cir. Aug. 9, 2005] [same]

**IV. Interplay Between Section 106 and Section 4(f)**

Section 106 also plays a role in agency compliance with Section 4(f) of the Department of Transportation Act. Section 4(f) prohibits the Secretary of Transportation from approving any transportation project or program that would “use” land from any park, historic site, recreational area, or wildlife refuge, unless [1] there is “no prudent and feasible alternative” to harming the site, and [2] the project includes “all possible planning to minimize harm” to the protected resources. 23 U.S.C. § 138; 49 U.S.C. § 303.

In determining whether a “constructive use” of historic properties has occurred as a result of a highway’s adverse proximity impacts, the court will give deference to the views of the ACHP regarding the importance of the property’s setting to their historic associations. See **City of South Pasadena v. Slater**, 56 F. Supp. 2d 1106, 1122 (C.D. Cal. 1999). Likewise, in determining which of two or more alternatives would involve a greater “use” of historic sites under Section 4(f), the Secretary of Transportation must take into account the views of the ACHP. See **Concerned Citizens Alliance, Inc. v. Slater**, 176 F.3d 686 [3d Cir. 1999]. However, in the Section 4(f) context, the agency need not accord those views absolute deference. Id.

In addition, because the historic properties protected by Section 106 and Section 4(f) are similarly defined, one court recently held that “it follows that the [Federal Highway Administration] must complete its section 106 determinations before it can comply with section 4(f)”’. **Corridor H Alternatives, Inc. v. Slater**, 166 F.3d 368, 371 [D.C. Cir., 1999]. However, it is permissible to defer Section 4(f) analysis of limited “ancillary” activities associated with highway construction, such as the location of “borrow” pits, which are better evaluated at the design stage of the project. **City of Alexandria v. Slater**, 198 F.3d 862 [D.C. Cir. 1999]. One court has also held that agency efforts to identify historic properties prior to the issuance of the Record of Decision (“ROD”) were adequate, and therefore did not violate Section 4(f), even though the agency deferred many of the required Section 106 reviews until after the ROD was issued pursuant to the terms of a Programmatic Agreement. **Valley Community Preservation Comm’n v. Peters**, 373 F.3d 1078 [10th Cir. 2004].