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17 UNITED STATES DISTRICT COURT
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA

19 PRESIDIO HISTORICAL ASSOCIATION;
20 and SIERRA CLUB,

21 Plaintiffs,

22 v.

23 PRESIDIO TRUST, a federal government
24 corporation,

25 Defendant.

Case No. 3:12-cv-00522-LB

**CORRECTED AMICUS CURIAE BRIEF
OF THE NATIONAL TRUST FOR
HISTORIC PRESERVATION**

Date: May 16, 2013
Time: 9:30 am
Court: Ctrm C, Hon. Laurel Beeler

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ARGUMENT

As the Defendant has noted, “the National Trust for Historic Preservation (the Congressionally-chartered organization charged with safeguarding historic preservation),” was one of the parties that participated in consultation under Section 106 of the National Historic Preservation Act regarding this project, and the National Trust “concurred”¹ in the Programmatic Agreement (PA) that was negotiated as a result of that consultation. Fed. Def.’s Cross-Mot. For SJ & Opp. to Pls’ Mot. For SJ, at 35 n.22 (hereafter Fed. Def.’s Cross-Mot.). Nevertheless, the National Trust has asked this Court for permission to file this *amicus curiae* brief because the National Trust strongly disagrees with one of the arguments raised by the Defendant, regarding the interpretation of Section 110(f) of the National Historic Preservation Act, 16 U.S.C. § 470h-2(f), which is an issue of first impression.²

I. The Defendant’s Interpretation of Section 110(f) of the National Historic Preservation Act is Contrary to Law

A. Section 110(f) Imposes a Stringent Substantive Standard for Any Project that Will Adversely Affect a National Historic Landmark, Such as the Project at Issue in this Case.

The National Historic Landmark program was authorized by Congress in order to recognize “properties of exceptional value to the nation as a whole rather than to a particular State or locality.” 36 C.F.R. § 65.2(a); *see* 16 U.S.C. § 470a(a). In contrast to properties listed on the National Register of Historic Places, which are nominated by state historic preservation officers and federal agencies, 36

¹ The opportunity to “concur” in a Section 106 agreement is an optional, symbolic gesture that has no legal significance, but is often used by consulting parties such as the National Trust to indicate appreciation for the agency’s consultation efforts. *See* 36 C.F.R. § 800.6(c)(3) (“*Concurrence by others.* The agency official may invite all consulting parties to concur in the . . . agreement. . . . The refusal of any party invited to concur in the . . . agreement does not invalidate the . . . agreement.”) Indeed, concurrence in a Section 106 agreement may ultimately strengthen the standing of the concurring party to enforce legal compliance with the agreement. *See generally Tyler v. Cuomo*, 236 F.2d 1124, 1134-35 (9th Cir. 2000).

² The National Trust also disagrees with the suggestion by the Defendant that the Plaintiff lacks standing, but we assume the ample case law as well as the declarations supplied by Plaintiffs’ members will be sufficient to substantiate the Plaintiff’s standing in the eyes of the Court.

1 C.F.R. §§ 60.5-60.9, National Historic Landmarks are designated by the Secretary of the Interior based
2 upon the Department's own research. Each property considered for National Historic Landmark status
3 must be approved and recommended by the National Park System Advisory Board. *Id.* § 65.5(d)-(e).

4 Section 110(f) of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470h-2(f),
5 mandates that federal agencies have affirmative, substantive responsibilities to protect National Historic
6 Landmarks to the "maximum extent possible." Section 110(f) provides as follows:
7

8 Prior to the approval of any Federal undertaking which may directly and adversely affect
9 any National Historic Landmark, the head of the responsible agency shall, *to the maximum*
10 *extent possible, undertake such planning and actions as may be necessary to minimize*
11 *harm to such landmark* and shall afford the Advisory Council a reasonable opportunity to
12 comment on the undertaking.

13 16 U.S.C. § 470h-2(f) (emphasis added). Section 110(f) was enacted in 1980 as part of a comprehensive
14 set of amendments to the NHPA. *See* National Historic Preservation Act Amendments of 1980, Pub. L.
15 No. 96-515, 94 Stat. 2981 (1980). The amendments significantly expanded the statutory responsibilities
16 of federal agencies to preserve and protect historic properties.

17 The legislative history of Section 110(f) explicitly states that it "establishes a higher standard of
18 care to be exercised by federal agencies" with respect to National Historic Landmarks, as compared to
19 the standard under Section 106 of the NHPA, which applies to all sites listed in, or eligible for, the
20 National Register of Historic Places (National Register). H.R. Rep. No. 96-1457, at 38 (1980), *reprinted*
21 *in* 1980 U.S. Code Cong. & Admin. News 6378, 6401. Section 106, part of the original 1966 NHPA,
22 only requires that federal agencies "take into account" the effect of their undertakings on historic
23 properties, and afford the Advisory Council on Historic Preservation an opportunity to comment in
24 advance on any such proposed undertakings. 16 U.S.C. § 470f. Section 110(f) requires more than that.
25 "This section does not supersede Section 106, but complements it by setting a higher standard for agency
26 planning in relationship to [National Historic] landmarks before the agency brings the matter to the
27

1 [Advisory] Council.” H. Rep. No. 96-1457, *supra*, 1980 U.S. Code Cong. & Admin, News at 6401.

2 This higher standard was codified by the National Park Service (NPS) in *The Secretary of the*
3 *Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to*
4 *Section 110 of the National Historic Preservation Act of 1966* (“Section 110 Guidelines”), which state
5 that “Section 110(f) of the NHPA requires that Federal agencies exercise a higher standard of care when
6 considering undertakings that may directly and adversely affect NHLs [National Historic Landmarks].”
7 63 Fed. Reg. 20,495 (Apr. 24, 1998). The Section 110(f) Guidelines further direct agencies to “consider
8 all prudent and feasible alternatives to avoid an adverse effect on the NHL.” *Id.* at 20,503. This
9 language, as will be discussed below, mirrors that of Section 4(f) of the Department of Transportation
10 Act, 49 U.S.C. § 303. The explicit terms of the statutory language of Section 110(f), as well as its
11 legislative history, provide clear guidance as to the statute’s strict mandate—to set the strongest and
12 highest standard possible for protection for the nation’s historic landmarks.
13
14

15 The Defendant argues that the regulations issued by the Advisory Council on Historic
16 Preservation “allow agencies to use the section 106 consultation process to comply with section 110(f),”
17 if additional procedural requirements, such as providing notifications and invitations to participate in
18 consultation, are completed. Fed. Def.’s Cross-Mot. at 5, 33. The Defendant, however, fails to consider
19 the full provision related to the use of the Section 106 process to comply with Section 110(f).
20

21 The complete provision of the Section 106 regulations cited by the Defendant states that, “[w]hen
22 commenting on such undertakings, the [Advisory] Council shall use the process set forth in §§ 800.6
23 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in
24 this section.” 36 C.F.R. § 800.10 (emphasis added). The “special consideration” that is to be afforded to
25 National Historic Landmarks is the statutory requirement that agencies “to the maximum extent possible,
26 undertake such planning and actions as may be necessary to minimize harm to any National Historic
27

1 Landmarks.” 36 C.F.R. § 800.10. The Section 106 process, therefore, does not by itself satisfy the
2 requirements of Section 110(f). Federal agencies must comply with *all* of § 800.10 to fulfill their
3 affirmative requirements under Section 110(f).

4 **B. The Requirement to “Minimize Harm” to the “Maximum Extent Possible” is Most**
5 **Closely Analogous to Section 4(f) of the Department of Transportation Act.**

6 The language of Section 110(f) is markedly similar to preexisting provisions in Section 4(f) of the
7 Department of Transportation Act, 49 U.S.C. § 303(c), which has received much judicial attention. The
8 language of Section 110(f) that requires “such planning and actions as may be necessary to minimize
9 harm” to landmarks is nearly identical to that in the second proviso of Section 4(f), which requires “all
10 possible planning to minimize harm.” 49 U.S.C. § 303. Indeed, the legislative history of Section 110(f)
11 is replete with reference to Section 4(f), and confirms that Congress intended to incorporate its language
12 into the statutory terms of Section 110(f).³

14 The National Trust’s direct involvement in the enforcement of Section 110(f) through litigation
15 dates back to the mid-1980s and our successful lawsuit as a co-plaintiff to stop the construction of an
16 elevated waterfront highway in downtown Mobile, Alabama. *Coalition Against a Raised Expressway*
17 *(CARE) v. Dole*, No. 84-1219-C, 1986 U.S. Dist. LEXIS 30976, at *49 (S.D. Ala. Oct. 20, 1986), *aff’d on*
18 *other grounds*, 835 F.2d 803 (11th Cir. 1988).⁴ The proposed highway would have come within 40 feet
19 of the Mobile City Hall, a National Historic Landmark, thus triggering the requirements of both Section
20 110(f) of the NHPA and Section 4(f) of the Department of Transportation Act. The federal district court
21 in that case recognized that Section 110(f) “significantly expanded the statutory responsibilities of federal
22 agencies” for preservation. The court repeatedly emphasized that Section 110(f) establishes a “higher
23

24 _____
25 ³ Although Section 110(f) itself does not repeat the first proviso of Section 4(f) (that historic sites may be
26 used only if “no prudent and feasible alternatives” exist, the legislative history explicitly states that
27 Congress intended agencies to “*consider* prudent and feasible alternatives.” H. Rep. No. 96-1457, *supra*,
1980 U.S. Code Cong. & Admin. News at 6401 (emphasis added).

28 ⁴ The district court’s opinion in *CARE v. Dole* is also published at 17 *Env’tl L. Rep.* 20,466.

1 standard of care” than Section 106, and cautioned that “[c]ompliance with Section 106 does not
 2 necessarily satisfy the mandate of Section 110(f) with its higher standard of care.” However, the court
 3 ultimately concluded that it was not necessary to formally reach the issue of whether the agency had
 4 violated Section 110(f). The court ruled instead that the proposed elevated highway would “substantially
 5 impair,” and “constructively use,” the Mobile City Hall, thus triggering the clearly substantive mandate
 6 of Section 4(f) to avoid and incorporate “all possible planning to minimize harm.” Ultimately, the
 7 court’s reasoning made it clear that the court considered the substantive scope of Section 110(f) to be
 8 very similar to Section 4(f), by concluding that “compliance with Section 4(f) will moot the Section
 9 110(f) claim.”

11 **II. Cases Construing NHPA Section 110(a) Are Not Applicable to Section 110(f), Which**
 12 **Employs Completely Different Statutory Language.**

13 The Defendant attempts to rely on cases construing Section 110(a) of the NHPA in an effort to
 14 bootstrap those interpretations onto Section 110(f). The National Trust agrees with the Plaintiff that the
 15 cases cited by Defendant are not dispositive and do not govern Section 110(f).⁵

16 Section 110(a) is the provision that applies to federal agency stewardship of historic properties,
 17 and includes phrases such as:

- 19 • “*assume responsibility for the preservation* of historic properties which are owned or controlled”
 20 by the agency, 16 U.S.C. § 470h-2(a)(1);
- 21 • “[p]rior to acquiring, constructing, or leasing buildings . . . each Federal agency shall *use, to the*
 22 *maximum extent feasible, historic properties available* to the agency, *id.*;”
- 23 • “ensure” that “properties under the jurisdiction or control of the agency . . . are managed and
 24 maintained in a way that *considers* the preservation of their historic . . . values in compliance
 25 with section 106 and gives *special consideration to the preservation* of such values in the case of
 26 properties designated as having National significance,” *id.* § 470h-2(a)(2)(B);
- “ensure” that “the preservation of properties not under the jurisdiction or control of the agency,
 but subject to be potentially affected by agency actions are given *full consideration in planning*,”
id. § 470h-2(a)(2)(C);

27 ⁵ See generally Pl’s Comb. S.J. Opp. & Reply [Doc. 31], at 26-27.

1 (Emphasis added).

2 One of the early cases addressing Section 110(a) was a case brought by the National Trust
3 challenging the Army's neglect of the National Park Seminary Historic District at the Walter Reed Army
4 Medical Center. The federal district court rejected the argument that the language in Section 110(a)
5 imposes a "substantive" standard that is stronger than compliance with Section 106. *National Trust for*
6 *Historic Preservation v. Blanck*, 938 F. Supp. 908 (D.D.C. 1996), *aff'd on other grounds*, 203 F.3d 53
7 (D.C. Cir. Oct. 22, 1999) (mem.).⁶ However, the language of the district court's opinion in the *Blanck*
8 case makes it clear that the court's ruling was strictly limited to Section 110(a), and did not attempt to
9 reach Section 110(f). After reviewing the language of Section 110(a) in detail, 938 F. Supp. at 920, the
10 court stated, "[t]he Court concludes that Section 110(a) cannot be read to create new substantive
11 preservationist obligations separate and apart from the overwhelmingly procedural thrust of the NHPA . .
12 . ." *Id.* at 922 (emphasis added).

13
14
15 The court in *Blanck* also repeatedly pointed out that the earlier ruling in *Lee v. Thornburgh*, 877
16 F.2d 1053 (D.C. Cir. 1989), involved two *different* provisions of Section 110—namely, Section 110(b),
17 which calls for the recordation of historic properties prior to demolition, and Section 110(d), which calls
18 for agencies to "carry out agency programs and projects. . . in accordance with the purposes of [the
19 NHPA]," and to "give consideration to programs and projects which will further the purposes of [the
20 NHPA]." 16 U.S.C. §§ 470h-2(b), 470h-2(d). *See* 938 F. Supp. at 921, 922. None of these provisions is
21 remotely as strong as the language of Section 110(f), which requires agencies to "minimize harm" to the
22 "maximum extent possible." *Id.* § 470h-2(f).

23
24 The Defendant's argument attempts to rely on cases such as *Blanck* and *Lee v. Thornburgh*, which
25 involved provisions of Section 110 *other than* 110(f), and asks this Court to make the leap of extending
26

27
28 ⁶ The appellate opinion is reported in full at 1999 U.S. App. LEXIS 29703 (D.C. Cir. Oct. 22, 1999).

1 those rulings to a different provision of the statute with language that is much stronger. There is simply
2 no legal basis for reducing Section 110(f) to the lowest common denominator, as the Defendant suggests.

3 **III. The Advisory Council on Historic Preservation is Not the Agency Charged With**
4 **Implementing Section 110(f), and Thus Should Not Receive Greater Deference from this**
5 **Court than the National Park Service.**

6 The Defendant also argues that this Court should consider the stringent standard of Section 110(f)
7 as being satisfied by the existence of a Section 106 Programmatic Agreement simply because the
8 Advisory Council on Historic Preservation (ACHP) attempted to pronounce the outcome as satisfactory.
9 Fed. Def.'s Cross-Mot. For SJ & Opp. to Pls' Mot. For SJ, at 37. The Defendant's reliance on the
10 ACHP, however, is misplaced. Under the NHPA, the Secretary of the Interior (and thus the National
11 Park Service⁷)—not the Advisory Council on Historic Preservation—has been given the authority by
12 Congress to interpret Section 110 of the NHPA. 16 U.S.C. § 470a(g) (“the Secretary shall promulgate
13 guidelines for Federal agency responsibilities under section 470h-2 of this title.”) By contrast, the
14 ACHP's authority is limited to Section 106. *Id.* § 470s (“[t]he Council is authorized to promulgate such
15 rules and regulations as it deems necessary to govern the implementation of section 106 of this Act”)
16 (emphasis added).
17

18 The Defendant's attempt to bootstrap the Section 106 Programmatic Agreement (PA) into a
19 certificate of compliance with the more stringent substantive standards of Section 110(f) was already a
20 source of controversy during the administrative process. For example, in drafting the “execution clause”
21 at the end of the PA, one early draft attempted to state that the signatories agreed that the Defendant had
22 “taken into account the effects of this Undertaking on historic properties in compliance with 36 C.F.R.
23 Part 800 and Section 110(f) of the NHPA.” AR037831 (Emphasis added). Based on objections from the
24 consulting parties, however, this provision was revised in the final PA to clarify that the Defendant had
25

26
27 ⁷ See 16 U.S.C. § 470w(11) (“‘Secretary’ means the Secretary of the Interior acting through the Director
of the National Park Service except where otherwise specified”).

1 only “afforded the ACHP a reasonable opportunity to comment on the Undertaking,” since that
2 requirement is identical in both Section 106 and Section 110(f). AR000223. This revision is significant
3 because it illustrates a recognition by all parties that the Section 106 agreement cannot properly serve to
4 confirm compliance with the substantive standard of Section 110(f).

5
6 Statements made by the NPS in the Section 213 Report similarly confirm the substantive
7 requirements of Section 110(f). In the Section 213 Report, the NPS acknowledged the strict standards of
8 Section 110(f) and recommended seven changes to the proposed undertaking to avoid, minimize or
9 mitigate the negative effect on the Presidio NHL. The NPS strongly encouraged the Defendant to take its
10 recommendations, “[g]iven the significance of the resource and *the obligation of the [Defendant] to*
11 *minimize harm to this National Historic Landmark District to the maximum extent possible.*” Section
12 213 Report: Presidio of San Francisco National Historic Landmark. Prepared for the Advisory Council
13 on Historic Preservation by Elaine Jackson-Retondo, Ph.D. National Park Service, Pacific West Region
14 (Apr. 6, 2009), at ix (emphasis added). In typical Section 106 reviews, an agency need not fulfill this
15 added obligation.
16

17 Reviewing courts should defer to the agencies with special expertise regarding particular
18 resources or issues, when those agencies disagree with the lead agency—a principle that has been
19 repeatedly affirmed both in this and other circuits.⁸ The agency assigned by Congress to implement and
20

21 ⁸ See *Sierra Club v. Marsh*, 816 F.2d 1376, 1388 (9th Cir. 1987) (court deferred to the “more appropriate
22 expertise” of Fish & Wildlife Service, rather than Army Corps of Engineers, regarding protection of
23 endangered species from highway and flood control project); *City of South Pasadena v. Slater*, 56 F.
24 Supp. 2d 1106, 1126-27 (C.D. Cal. 1999) (court enjoined freeway project where other agencies,
25 including the Advisory Council on Historic Preservation, objected to its destructive impacts); *State of*
26 *Alaska v. Andrus*, 580 F.2d 465, 474 n.44 (D.C. Cir. 1978) (heightened obligation to respond to the
27 contrary views of “mission oriented Federal agencies”); *Association of Amer. RRs v. Costle*, 562 F.2d
28 1310 (D.C. Cir. 1977) (court refused to defer to lead agency’s statutory interpretation when three other
federal agencies with relevant expertise disagreed); *Delta Air Lines v. Civil Aeronautics Bd.*, 543 F.2d
247, 260 (D.C. Cir. 1976) (“in general we believe that the Board should defer to the safety expertise of its
sister agencies”); *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir. 1983) (“the
court may properly be skeptical as to whether an EIS’s conclusions have a substantial basis in fact if the
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1 interpret Section 110 is the National Park Service, not the ACHP. 16 U.S.C. § 470a(g). *See also*
2 *Concerned Citizens Alliance v. Slater*, 176 F.3d 686, 696-97 (3d Cir. 1999) (declining to defer to the
3 ACHP’s views on which alternative represented the one that would “minimize harm” under the language
4 in Section 4(f) that parallels Section 110(f)).

5
6 The Defendant’s reliance on the letter from John Fowler, Executive Director of the ACHP, to
7 demonstrate compliance with Section 110(f) is, therefore, misplaced. The Court should defer to the
8 agency with the statutory authority and special expertise to interpret Section 110, which is clearly the
9 NPS through the Secretary of the Interior. The NPS acknowledged the Defendant’s additional
10 requirements under Section 110(f) in the Section 213 Report as previously discussed.

11 12 13 **CONCLUSION**

14 For the reasons stated above, the National Trust respectfully urges this Court to reject the
15 Defendant’s proposed interpretation that Section 110(f) of the National Historic Preservation Act is
16 limited exclusively to procedural requirements. Instead, this Court should recognize that Section 110(f)
17 establishes a more stringent substantive standard, which must be applied in evaluating whether the record
18 substantiates compliance.

19
20 DATED: April 15, 2013

21
22 responsible agency has apparently ignored the conflicting view of other agencies having pertinent
23 expertise.” “Although the FEIS purported to respond to these comments, no new studies were performed,
24 no additional information was collected, no further inquiry was made; and the FEIS essentially reiterated
25 or adopted the statements in the DEIS.”); *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (HUD
26 project drew “heavy” criticism from 3 federal agencies--Agriculture, Commerce, & EPA) (“[W]here
27 comments from responsible experts or sister agencies disclose new or conflicting data or opinions that
28 cause concern that the agency may not have fully evaluated the project and its alternatives, these
comments may not simply be ignored. There must be good faith, reasoned analysis in response.”);
Florida Key Deer v. Stickney, 864 F. Supp. 1222, 1231-38 (S.D. Fla. 1994) (court deferred to Interior
Department rather than FEMA in an Endangered Species Act dispute, due to Interior’s paramount
expertise, even though Interior was assessing the impacts of a FEMA project).

1 Respectfully submitted,

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7 **ECF filing Attestation**

8 Pursuant to ECF General Order 45(X), I attest that F. Theodore Kitt has concurred in the filing of this
9 document.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the U.S. District Court for the Northern District of California by using the CM/ECF system on April 15, 2013. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

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